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95-439

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No._____

Supreme Court, U.S.
FILED
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In The

# Supreme Court of the United States

October Term, 1995

JAMES E. FLAHERTY,

*Petitioner,*

MARIANNE B. FLAHERTY

*Petitioner,*

*- against -*

NATIONAL MARINE FISHERIES SERVICE, et., al.

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES E. FLAHERTY, *Appearing Pro-Se*
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182 pp

## QUESTIONS PRESENTED

I. In an action against, an agency of the United States, upon discovery by party that 2/3 of the District Court file was lost or missing, including 1/3 of Administrative Record, does party have right to have pending motion to compel reconstruction of lost records, pursuant to 18 USC §1735(b) decided, and lost Court records replaced, prior to party having to answer agency's summary judgment motion?

II. Does non-party to action against agency of United States seeking to inspect public Court records, not under seal, have standing to bring either motion, or separate action, against U. S. Attorney and Clerk of District Court, to compel reconstruction of said lost District Court records, pursuant to 18 USC §1735(b)?

## PARTIES

The names of all parties to proceeding in the Court whose judgment is sought to be reviewed are as follows:

JAMES E. FLAHERTY, *Petitioner,*

MARIANNE B. FLAHERTY, *Petitioner*

v.

NATIONAL MARINE FISHERIES SERVICE, Financial Services Division, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, UNITED STATES DEPARTMENT OF COMMERCE, C WILLIAM VERITY, in his official capacity as Secretary of Commerce, WILLIAM EVANS in his official capacity as Assistant Administrator for Fisheries, JAMES E. DOUGLAS, Jr., in his official capacity as Acting Assistant Administrator for Fisheries, MICHAEL L. GRABLE, in his official capacity as Chief, Financial Services Division, National Marine Fisheries Service, CHARLES L. COOPER, in his official capacity as Program Leader, National Marine Fisheries Service,

*Respondent.*

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JAMES E. FLAHERTY,

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*Respondents.*

## PETITION FOR WRIT OF CERTIORARI

## TO THE UNITED STATES COURT OF APPEALS

## FOR THE SECOND CIRCUIT

petition this court for a writ of certiorari to review the judgment of the Court of appeals for the Second Circuit which was entered on June 15, 1995.

## OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Second Circuit, ( the **"2d Cir. Opinion"** ) appears at (App. A) at A-1.

The unpublished May 27, 1994 opinion of the U. S. District Court, EDNY, relevant to petitioner Marianne B. Flaherty, ( the **"MBF Opinion"** ) which was affirmed by the **"2d Cir. Opinion"** appears at (App B ). at A-12,

The unpublished May 12, 1994 opinion of the U. S. District Court, EDNY, relevant to petitioner James E. Flaherty, ( the **"JEF Opinion"**) which was partially reversed by the **"2d Cir. Opinion"** appears at (App. C), at A-15.

The unpublished January 28, 1993 opinion of the U. S. District Court, EDNY, relevant to petitioner James E. Flaherty, appears at (App. D), at A-15.

The unpublished May 9, 1991 opinion of the U. S. District Court, EDNY, relevant to petitioner James E. Flaherty, appears at (App. E), at A-51.

The published October 13, 1988 opinion of the U. S. District Court, EDNY, relevant to petitioner James E. Flaherty, is published in the Federal

Supplement, Flaherty v. NMFS , 697 F. Supp. 127, appears at (App. F), at A-79.

The unpublished March 10, 1992 opinion of the U. S. District Court, EDNY, relevant to petitioner James E. Flaherty, appears at (App. G), at A-104.

The unpublished December 16, 1992 Final Determination of Respondent National Marine Fisheries Service appears at (App. H), at A-104.

## JURISDICTION

The Court of Appeals entered judgment on June 15, 1995 (App. A) This Court has jurisdiction under 28 § U.S.C. § 1254(1)

## STATUTORY PROVISIONS & RULES INVOLVED

28. U. S. C. §1735(b) which appears at at (App. I), at A-124, and mandates that in the case of lost court records, in which the United States has an interest, (such as litigation against one of its agencies), the United States Attorney, and the Clerk of the Court, under the supervision of the judges in the district where the court records were lost shall take whatever steps are necessary to reconstruct the lost court records.

## CONSTITUTIONAL PROVISIONS INVOLVED

The common law right of the public to inspect and copy court records, specifically court

records in which the United States is a Prty to the action, under the First Amendment protecting speech, the Fifth and Fourteenth ( in state actions) Amendments protecting due process of law, and Sixth Amendment (which guarantees a public trial), to the United States Constitution are involved.

## STATEMENT OF CASE

Petitioners James E. Flaherty and Marianne B. Flaherty seek a writ of certiorari to the United States Court of Appeals for the Second Circuit upon the Circuit's affirmance by Opinion entered June 15, 1995,---of the District Court's Order dated May 27, 1994, the MBF Order,---which dismissed

both Petitioner Marianne B. Flaherty's 's Complaint, (App. L) and her Order to Show Cause, (App. M) and which Court of Appeals opinion partially affirmed the District Court's Order dated May 12, 1994, (App. C), relevant to both petitioners applications to the District Court to compel reconstruction of lost District Court files in Flaherty v. NMFS, CV-88-1275, by the Clerk of the District Court, and the United StatesAttorney, EDNY, pursuant to the statute at 28 U.S.C., §1735(b), which is set forth at (App. I).

Although this action has been remanded back to NMFS several times, the pertinent times, relevant to the issues before this

Court begin sometime on December 18, 1992 when Respondent National Marine Fisheries Service, ("NMFS" or "Fisheries") issued a final determination (App. H), denying Petitioner James E Flaherty's, (**"JEF"**) application for compensation for lost fishing gear pursuant to the Section 10 of the Fisherman's Protective Act, from the Fishing Vessel and Gear Damage Compensation Fund, whose enabling statute lies at 22 U.S.C. §1980.

The case was assigned to Magistrate-Judge Caden held a series of scheduling conferences during the Spring and early Summer of 1993, as a result of which a firm motion and litigation schedule was set, relevant to Fisheries

motion for summary judgment, in defense of NMFS's 12/16/92 decision, (App. H), the government submitted its motion, and when petitioner JEF's turn came he asked that the file be sent to the u.S. District courthouse, EDNY, closest to his residence.

On or about October 6, 1993, Petitioner JEF requisitioned the file at the Courthouse and the Clerk could only produce three, (3), folders, instead of the nine, (9, )folders that were on file when Petitioner JEF last viewed the court file of CV-88-2275, EDNY.

Petitioner brought a motion to produce the lost files before Magistrate Judge Caden, in or

about October 26, 1993, (App. J) at A-124.

Petitioner repeatedly asked for both the lost files and extensions of time to complete his opposing motion papers, pending reconstruction, or discovery of the lost files.

In March of 1993 the Pro Se Clerk faxed Petitioner MBF, a message indicating that there were still only 3 folders, (files) in the Court Clerk's office, (App. K), A-126.

Finally in April 1994, the Magistrate became exasperated because of Petitioner JEF's failure to adhere to scheduling orders, and the Magistrate made a recommendation of dismissal of Flaherty v. NMFS, to Judge Nickerson, for failure to prosecute.

At a hearing before Judge Nickerson, Petitioner JEF submitted a brief citing the governments obligations to reconstruct lost Court records under 28 U.S.C 1735(b), but Judge Nickerson adopted the Magistrate-Judges recommendation and dismissed the action by order dated May 12, 1994, (App. C), at A-15.

Thereafter Petitioner MBF prepared a new and separate complaint, (App. L) at A-127, in the nature of mandamus, along with Order to Show Cause, (App. M) at A-128 both of which sought to compel the construction of lost court records, by defendants U.S. Attorney, EDNY, and Clerk of U.S. District Court, EDNY.

On May 27, 1994, Petitioner MBF went to

Clerk's office, EDNY and attempted to file her complaint (App. L), and pay the $120.00 filing fee, but because it was brought by Order to Show Cause, the MBF complaint, (App. L), and MBF Order to Show Cause (App. M), were taken up to Judge Nickerson's Chambers for signing.

Parenthetically, the Court records sought by Petitioner MBF were not under seal.

Thereafter Judge Nickerson:

1) assigned the MBF action the same index number (CV-88-1275), as the index number in Flaherty v. NMFS , and

2) dismissed the MBF Order to Show Cause and Complaint, by Order dated May 27,

1994, ---(App. B), at A-12, on grounds that Petitioner MBJ had no standing to seek relief to compel reconstruction of lost court records in Flaherty v. NMFS, CV-88-1275, because she was not a party to that, (CV-88-1275), action.

Thereafter both petitioners appealed, to the United States Court of Appeals to the Second Circuit, and Petitioner's causes under Docket No. 94/6199, (JEF), and Docket No. 94/6201, (MBF) were consolidated.

The Index to Record on Appeal, as certified by Clerk, USDC, EDNY, (App. N), at A-133, shows 73 lost or missing Court documents, in the Petitioner's Civil Action, Flaherty v. NMFS, CV-88-1275, EDNY.

The causes were argued before the Second Circuit Court of Appeals on May 23, 1995, and in

Opinion entered on June 15, 1995, (App.-A),:

1) vacated dismissal of Flaherty v. NMFS, CV-88-1275

2) Affirmed Dismissal of MBF Action, and application to compel reconstruction of lost Court records, and

3) denied Petitioner JEF's application to compel reconstruction of lost Court records pursuant to 28 U.S.C. 1735(b).

It is from 2), and 3) that Petitioners MBF and JEF seek the review by, and intervention of the United States Supreme Court, as to the issues of whether either Petitioner JEF or Petitioner MBF has standing to compel reconstruction of lost Court

records, by Clerk of Court, EDNY and U.S. Attorney, EDNY, as is articulated under the enabling statute at 28 U.S.C. §1735(b), when viewed within the context of common law right of the public to inspect Court documents.

## REASONS FOR GRANTING THE WRIT

**I. PUBLIC CONFIDENCE IN THE JUDICIARY, PARTICULARLY WHEN GOVERNMENT IS A PARTY TO THE ACTION, SUCH AS IN THE CASE OF JUDICIAL REVIEW OF ADVERSE AGENCY ACTION UNDER THE ADMINISTRATIVE PROCEDURE ACT DEMANDS THAT THE PUBLIC BE SURE THAT WHEN OUR JUDICIARY DECIDES AN ISSUE, THE COURT, AND THE PARTIES ARE PLAYING WITH A FULL DECK OF CARDS, AND AFTER THE GAME IS OVER, THE PUBLIC CAN VIEW, NOT ONLY THE HAND OF THE WINNER, BUT THE HANDS OF THE LOOSER, AND ALL THE CARDS THAT HAVE BEEN PLAYED.**

Although many of our American legal principles derive from the English Magna Carta, our forefathers and their progeny have refined American law with the foremost objective of Government by the People, for the People, of the People.

In has been said by theologians that what distinguishes man from inferior animals is the fact that man has a soul and a conscience.

Similarly, in the American legal system, full dissemination of court news to and by the press, including access to court records during trial is encouraged, while in contrast, in the English legal system, full disclosure, access to the public, and

in the performance of the United States Court system, which embodies the reasonable expectation of the populace, that Court officials will adequately perform their ministerial duty as prescribed by law, including the safeguard and maintenance of official Court records which are under the care, custody and control of the Court, as well as the preservation,---in part through enactment by Congress of 28 U.S.C. §1735(b),---of public's right to inspect judicial records .

President James Madison once observed:

> "A popular Government without information, or means of acquiring it, is but a prologue to a farce or tragedy; or perhaps both---A people who mean to be their own government must arm themselves with the power that knowledge gives."

## II. PETITIONERS, AS WELL AS THE GENERAL PUBLIC HAVE A COMMON LAW RIGHT TO INSPECT AND COPY COURT RECORDS, NOT UNDER SEAL, WHICH ARE IN THE CARE, CUSTODY AND CONTROL OF THE CLERK OF THE UNITED STATES DISTRICT COURT

That there exists a common law right of both Petitioners and the Public, to inspect judicial records is beyond dispute; Brown v. Cumming , 10 B. & C. 70, , 109 Eng. Rep. 377 (K.B. 1829), Nixon v. Warner Communications, Inc . 435 U.S. 589, (1979)

In particular, two series of cases, the Nixon tape cases, United States v. Mitchell , 551 F.2d 152 (DC Cir. 1976), and , Nixon v. Warner Communications, Inc . 435 U.S. 589, (1979) and the ABSCAM tape cases, National

Broadcasting Company, Inc. v. Meyers , 635 F. 2d, 945, (2d. Cir. 1980) support the contention of Petitioners that even a non-party, (MBF), has the right to inspect and copy the entire Civil Court record of, Flaherty v. NMFS , CV-8-1275. EDNY, provided said record was not under seal.

In Nixon v. Warner , supra ., the Court said:

> "The Courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."

moreover the Court added:

> "American decisions generally do not condition enforcement of this right on a propriety interest in the document or upon a need for it as evidence in a lawsuit. The interests necessary to support the issuance of a writ compelling access has been found, for example, in the citizens desire to keep a watchful eye on the workings of public agencies."

What transpires in Court is public property.

Craig V. Harney , 67 S. Ct 1246, 1254, (1947)

The May 27, 1994 order of Judge Nickerson, (App. B), constructively denied Petitioner MBF the right to view Court documents as a citizen with a ..... "desire to keep a watchful eye on a public agency", namely respondent NMFS.

## III. THE UNITED STATES CODE, AT 28 U.S.C. §1735(b), AS AMENDED, SETS FORTH A MANDATORY DUTY ON THE PART OF GOVERNMENT TO RECONSTRUCT LOST OR MISSING COURT RECORDS, UNDER THE SUPERVISION OF THE JUDGES OF THE UNITED STATES DISTRICT COURT

The United States Code at 28 U.S.C. §1735(b), (App. I), says in pertinent part:

> "Whenever the United States is interested in any lost or destroyed records or files of a court of the United States, the clerk of the court and the United States Attorney for the district shall take the steps necessary to restore such records or files under the direction of the judges of such court."

The word "shall" when used in the statute imposes a "strict" and "mandatory" duty,upon the Clerk of the Court and the United States Attorney, Hill v. U. S. Immigration & Nat. Serv , 714 F.2d 1470, 1474-1475, (9th Cir. 1983)., Conco v. Northwest Bank Mason City N.A. 767 F.2d 471, (8th Cir. 1985).

> " Shall is a term of legal significance, in that it is mandatory or imperative, not merely percutory",

Under 28 U.S.C. §1735(b), the government has no choice, but to reconstruct lost or missing court records in an action where an agency of the federal government is a party thereto.

## IV. PETITIONER MARIANNE B. FLAHERTY HAD STANDING TO REQUEST RELIEF CONSISTING OF RECONSTRUCTION OF LOST OR MISSING COURT RECORDS IN FLAHERTY v. NMFS, CV-88-1275

In the Second Circuit the issue of standing of a non party to bring an action, or motion, by non-party, to compel production of court records under the care custody and control of the Clerk of the District Court was well settled in In Re. Application of National Broadcasting Co . Inc. 635

F.2d 945, 949 (2d. Cir., 1989), which says in pertinent part at Footnote #2:

"Since the order involves alleged rights the networks as third parties to the criminal litigation and since the deferral of a ruling on their claim until the appeal from the judgments on conviction would further deny them the relief they seek--- namely, contemporaneous televising of tapes, *Cohen* very likely applies. But we think that there is an even more basic reason why Judge Pratt's order is appealable now. That order adjudicates what is essentially a dispute between the networks as applicants and the Clerk of the District Court, as custodian of the evidence the networks seek to copy. That dispute could have been treated by the District Court as a new civil case and given a number separate from the criminal litigation, as in fact occurred under similar circumstances in when networks sought to copy the Watergate tapes. *See: United States v. Mitchell,* 386 F Supp. 369, 640 (D.D.C. 1974) ('matter treated as a miscellaneous proceeding') No jurisdictional significance should attach to the fact that Judge Pratt's order was entered within the framework of the pending criminal case, instead of a separate civil case ".

*Emphasis Added*

## V. THE ORDERS AND OPINIONS DENYING PETITIONERS STANDING TO COMPEL RECONSTRUCTION OF LOST COURT FILES AND RECORDS WHICH PETITIONERS SEEK TO VIEW, RISES TO THE LEVEL OF A CONSTITUIOONAL VIOLATION

The federal government shall not deprive any person of;..." life, liberty, or property without due process of law"

"What transpires in the Courtroom is public property" Craig V. Harney , 67 S. Ct 1246, 1254, (1947)

A deprivation of access by the general public to District Court records, not under seal, which are in the care, custody and control of the Clerk of the U. S. District Court rises to a level of a violation of the Fifth Amendment of the Constitution, United

States v. Mitchell , 551 F. 2d 1252, 1258, (D.C. Cir., 1976)

## CONCLUSION

For these reasons the petition for a writ of certiorari should be granted.

I. Upon Petitioner's right to inspect Court Records, Nixon v. Warner , supra., and the common law right of public to inspect Court records control;

II. Upon duty to replace and/or reconstruct lost, destroyed or missing Court records and files, by:

1) The Judges of the District Court,

2) The United States Attorney, EDNY, and

3) The Clerk of U. S. District Court, EDNY,

in action in which agency of United States is a

party,

1) statute, at 28 U.S.C. §1735(b),

2) Constitution, Amend. 1, 5, 6,

3) legislative intent of Congress,

4) and use of word "shall" in statute

are controlling factors which give Petitioners Marianne B. Flaherty and James E. Flaherty standing to compel reconstruction of missing files under 28 U.S.C. 1735(b).

Dated: Hampton Bays New York
September 11, 1995

Respectfully submitted,

**JAMES E. FLAHERTY,** ***Appearing Pro-Se***
**MARIANNE B. FLAHERTY,** ***Appearing Pro-Se***
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# APPENDIX A

JAMES E. FLAHERTY, *Plaintiff-Appellant,*

MARIANNE B. FLAHERTY, *Appellant,*

v.

NATIONAL MARINE FISHERIES SERVICE, Financial Services Division, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, UNITED STATES DEPARTMENT OF COMMERCE, C WILLIAM VERITY, in his official capacity as Secretary of Commerce, WILLIAM EVANS in his official capacity as Assistant Administrator for Fisheries, JAMES E. DOUGLAS, Jr., in his official capacity as Acting Assistant Administrator for Fisheries, MICHAEL L. GRABLE, in his official capacity as Chief, Financial Services Division, National Marine Fisheries Service, CHARLES L. COOPER, in his official capacity as Program Leader, National Marine Fisheries Service,

Defendants-Appellees

Docket No. 94/6199
Docket No. 94/6201

Argued May 23, 1995
Decided June 15, 1995

Appeals from the United States District Court for the Eastern District of New York.

These causes consolidated for the purpose of appeal, came to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and were argued by plaintiff-appellant pro-se, and by counsel for appellant and defendant appellees.

ON CONSIDERATION WHEREOF, it is now and hereby adjudged, and decreed that the final judgment of said District Court appealed in No. 94-6199 be and is hereby vacated and remanded in part; that so much of the appeal in No. 94-6199 as seeks review of nonfinal order in a different case

be and it is hereby dismissed for lack of Appellant jurisdiction; and that the order appealed in No. 94-6201 be and is hereby affirmed.

In No. 94-6199, plaintiff pro-se James E. Flaherty ("Flaherty") appeals from a judgment entered in the United States District Court for the Eastern District of New York., Eugene H. Nickerson District Court Judge, in Flaherty v. National Marine Fisheries Service ,88 CV 1275, dismissing his complaint pursuant to Fed. R. Civ. P. 16(f), for failure to comply with scheduling orders and for failure to prosecute; Flaherty also purports to appeal from an order of the district court dismissing his counterclaims in United States v.

Flaherty on the same grounds. For the reasons that follow, we dismiss so much of No. 94-6199 as seeks review of the order in United States v. Flaherty ; with respect to so much of No. 94-6199 as seeks review of dismissal of Flaherty v. National Marine Fisheries Service , we vacate and remand.

With respect to so much of we dismiss so much of No. 94-6199 as seeks review of the order in United States v. Flaherty , 88 CV 3275, we dismiss the appeal for lack of appellate jurisdiction.

When the decision of the district court does not pertain to an injunction, a receivership, or a case in admiralty, see 28 U.S.C.§1292(a), and is not an interlocutory order as to which the district court

has granted certification and we have granted leave to appeal, see id. 28 U.S.C. §1292(b), we lack jurisdiction to hear the appeal unless the decision is a "final" order within the meaning of 28 U.S.C. §1291. An order that adjudicates fewer than all of the claims remaining in the action is not a final order unless the court directs entry of a final judgment as to the dismissed claims "upon an express determination that there is no just reason for the delay." Fed R. Civ. P. 54(b). In United States v. Flaherty , 88-CV-3275, though the district court dismissed Flaherty's counterclaims, plaintiff's claims remain pending. The record does not indicate that the court entered a certification in

accordance with Rule 54(b). There being no final judgment or other appealable order in that case, we do not yet have appellate jurisdiction to review the dismissal of Flaherty's counterclaims. Accordingly, so much of the appeal in No. 94-6199 as seeks review of United States v. Flaherty ; 88 CV 3275, is dismissed.

So much of No. 94-6199 as seeks review of district Court's judgment dismissing the complaint in Flaherty v. National Marine Fisheries , Service, 88 CV 1275, however is properly before us, for that judgment disposed of the entire action. Though we sympathize with the district court's view that there has been persistent delay and noncompliance

with its orders, we conclude that the judgment should be vacated and the matter remanded for the following reasons. A district court has the power to dismiss a litigant's claim for failure to prosecute and for failure to comply with a scheduling order; but dismissal is a drastic penalty that should be imposed only after, inter alia , the court gives notice, especially to a pro-se litigant, that further delays will result in dismissal. See Simmons v. Abruzzo, 49 F.3d 83, 88 (2nd Cir. 1995) ; Bobal v. Renssalaer Polytechnic Institute, 916 F.2d 759, 764 (2d Cir.) (dissmissal with prejudice as sanction for abuse of discovery improper without prior notice) rev'd on rehearing on ground that notice had in fact been

given, id. at 765 (2d Cir. 1990), cert., denied, 499 U. S. 943 (1991).

In the present case, it is arguable that the April 13, 1994 report of the magistrate judge recommending that the district court dismiss for failure to prosecute should have sufficed to give Flaherty fair warning, and it would have been prudent for Flaherty to respond to the recommendation by giving some indication that he was prepared to proceed expeditiously, rather than reiterating his desire for further extensions. However we see no indication that he received notice from the court itself in the traditional manner that his complaint (or his counterclaims in United

States v. Flaherty)would be dismissed if he persisted in delaying the proceedings or failed to comply with the court's orders. Mindful that such notice to a pro-se litigant should come from the court and be clear, we conclude that the judgment should be vacated and the matter remanded to the district court for further proceedings.

We have considered all of Flaherty's other contentions on his appeal, to the extent that they are properly before us, and have found them without merit. On remand the district court may set and strictly enforce appropriate deadlines. Flaherty plainly is now on notice that continued delay or failure to comply with court deadlines will

likely result in dismissal.

In No. 94-6201, Marianne Flaherty appeals from an order of the district court in Flaherty v. National Marine Fisheries Service , 88 CV 1275, denying her motion for relief relating to the record in that case. The district court denied her motion on the ground that she is not a party to that action and hence lacks standing to seek any relief. We affirm that denial substantially for the reasons stated in Judge Nickerson's Memorandum and Order dated May 27, 1994.

s/ ELLSWORTH A. VAN GRAIFLAND, U.S.C.J.

s/ AMALYA L. KEARSE, U.S.C.J.

s/ JOHN M. WALKER, U.S.C.J.

N. B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

# APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

JAMES E. FLAHERTY,

88-CV-1275

Plaintiff,

MEMORANDUM
AND
ORDER

-against-

NATIONAL MARINE FISHERIES SERVICE, Financial Services Division, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, UNITED STATES DEPARTMENT OF COMMERCE, C WILLIAM VERITY, in his official capacity as Secretary of Commerce, WILLIAM EVANS in his official capacity as Assistant Administrator for Fisheries, JAMES E. DOUGLAS, Jr., in his official capacity as Acting Assistant Administrator for Fisheries, MICHAEL L. GRABLE, in his official capacity as Chief, Financial Services Division, National Marine Fisheries Service, CHARLES L. COOPER, in his official capacity as Program Leader, National Marine Fisheries Service,

Defendants.

----------x

JAMES E. FLAHERTY
42 Neptune Avenue
Hampton Bays, New York, 11946
Plaintiff pro se.

ZACHERY W. CARTER, United States Attorney
(Nancy A. Miller, of Counsel)
Brooklyn, New York.

NICKERSON, District Judge:

Marianne Flaherty, the wife of plaintiff James E. Flaherty, asks the court to enter a preliminary injunction directing the United States Attorney to restore missing documents to the file of the above-captioned case. Marianne Flaherty is not a party in the case and lacks standing to request the relief she seeks.

The motion is denied.

So ordered.

Dated: Brooklyn, New York
May 27, 1994

s/ Eugene H. Nickerson, U.S.D.J.

## APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

JAMES E. FLAHERTY, 88-CV-1275

Plaintiff, MEMORANDUM AND ORDER

-against-

NATIONAL MARINE FISHERIES SERVICE, Financial Services Division, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, UNITED STATES DEPARTMENT OF COMMERCE, C WILLIAM VERITY, in his official capacity as Secretary of Commerce, WILLIAM EVANS in his official capacity as Assistant Administrator for Fisheries, JAMES E. DOUGLAS, Jr., in his official capacity as Acting Assistant Administrator for Fisheries, MICHAEL L. GRABLE, in his official capacity as Chief, Financial Services Division, National Marine Fisheries Service, CHARLES L. COOPER, in his official capacity as Program Leader, National Marine Fisheries Service,

Defendants.

----------x

----------x

UNITED STATES OF AMERICA, 88-CV-3275

Plaintiff, MEMORANDUM AND ORDER

-against-

JAMES E. FLAHERTY, also known as "James A. Flaherty" also known as "James E. Flaherty Jr.," MARIANNE B. FLAHERTY individually and doing business as Fishing Vessel "Stacy Lyn," Timothy Sauer, "JOHN DOE #1 through "JOHN DOE # 10 inclusive such names being ficticious and unknown to the Plaintiff, the persons or parties intending to be tenants, occupants, persons, corporations, or other legal entities, if any, having or claiming an iterest in or lien upon the premises described in the complaint,

Defendants.

----------x

JAMES E. FLAHERTY
42 Neptune Avenue
Hampton Bays, New York 11946
Plaintiff and defendant pro se.

ZACHARY W. CARTER, United States Attorney
(Nancy A. Miller and William Young, of counsel)
Brooklyn, New York.

NICKERSON, District Judge:

These two actions have been pending in this court since 1988. In a Report and Recommendation dated April 13, 1994 Magistrate Judge John L. Caden recommended that the court grant the government's pending motions to dismiss the complaint of pro se James E. Flaherty ("Flaherty") in 88 CV 1275 ("Action One") and his counterclaims and third-party claims in 88 CV 3275 ("Action Two"), all for failure to prosecute in good faith.

I

The relevant facts and procedural history are, in substance, the following.

A

Flaherty brought an action, 88 CV 1275, against the National Marine Fisheries Service ("Fisheries"), challenging its denial of his application for compensation for lost fishing gear under the

Fisherman's Protective Act, 22 U.S.C. § 1980.

Flaherty is a commercial lobsterman. He alleges that on December 17, 1986 another fishing vessel dragged its nets over his lobster pots, causing a loss of 636 of the 900 pots deployed. On January 13, 1987, plaintiff filed a claim with Fisheries for compensation from the Fishing Vessel and Gear Compensation Fund ("the Fund").

On October 23, 1987, Fisheries issued its initial determination denying Flaherty's claim. Flaherty appealed, and on March 25, 1988, Fisheries denied the appeal. Flaherty then began this action. The complaint claimed that Fisheries' denial of his claim was in contravention of the Fisherman's Protective Act, 22 U.S.C. §1971, the Administrative Procedure Act, 5 U.S.C. §706 et seq., and deprived Flaherty of due process protected by the Fifth Amendment. The court ordered Fisheries to articulate further the reasons it denied plaintiff's claim. Flaherty v. National Marine Fisheries Service, 697 F.Supp. 127 (E.D.N.Y. 1988). In a letter dated February 1, 1989 Fisheries complied with the court's order, explaining more fully its decision as outlined above but offering essentially no new insights.

The government subsequently moved for summary

judgment. Flaherty cross-moved 1) to expand the administrative record to include prior applications for compensation from Fisheries; 2) to consolidate this action with United States v. Flaherty, 88 CV 3275, a foreclosure action on a loan taken out by Flaherty and others, and 3) for leave to amend the complaint. In a Memorandum and Order dated May 9, 1991 the court denied all motions and remanded the case to Fisheries, see 1991 U.S. Dist. LEXIS 7258. The parties moved for reargument, which the court denied in a Memorandum and Order dated March 10, 1992, see 1992 U.S. Dist. LEXIS 1951. In letters dated August 24, 1992 and December 16, 1992 Fisheries again denied Flaherty's claim.

On October 29, 1992, believing that Fisheries had issued its final determination, Flaherty filed a motion for leave to file an amended complaint. The court granted that motion in a Memorandum and Order dated January 20, 1993.

In a motion dated September 3, 1993 the government moved for summary judgment.

B

On October 18, 1988 the government filed a foreclosure action on Small Business Administration Loans taken out by Flaherty and others.

The government alleged the following facts.

On November 5, 1979 Flaherty executed a promissory note in the amount of $85,000 to the North Fork Bank and Trust Company. The note is secured by the guarantee of Marianne B. Flaherty and a mortgage dated November 5, 1979 in the principal amount of $35,000. The note, guarantee, and mortgage were assigned to the Small Business Administration on October 19, 1987.

On June 18, 1986 Flaherty, along with his wife Marianne B. Flaherty, individually, and doing business as the fishing vessel "Stacy Lynn," executed a second promissory note in the amount of $165,000 to the Small Business Administration. On August 18, 1986 Flaherty and Marianne Flaherty, individually, and doing business as the fishing vessel "Stacy Lynn," amended this note by increasing the principal amount to $193,000. This note was secured by two mortgages, each in the principal amount of $165,000. Each mortgage was subsequently amended to $193,000.

On February 10, 1986 Flaherty and Marianne B. Flaherty executed a third promissory note in the amount of $83,600 to the Small Business Administration. The government alleges that Flaherty and the other named defendants have defaulted in their payments under the notes, guarantees, and mortgages.

Flaherty subsequently filed counterclaims and third-party claims (styled as counterclaims) against the government and its employees. The first such claim is a Bivens action naming employees of various government agencies in their individual capacities as having committed assorted torts. The second claim is an action against the Small Business Administration and Fisheries under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. and the Tucker Act, 28 U.S.C. § 1346, for breach of contract and various torts, as well as a claim against Fisheries pursuant to the Privacy Act, 5 U.S.C. § 552a.

In a motion dated February 21, 1991 the government moved to dismiss Flaherty's counterclaims and third-party claims.

C

Flaherty has shown an increasing unwillingness to move forward in both cases despite the numerous attempts by Magistrate Judge Caden and the court to accommodate his preferences.

Initially Flaherty pursued his claims with relative diligence, with only occasional requests for enlargements of time and other accommodations. See Letter of James E. Flaherty, Feb. 21, 1989 (handwritten

letter explaining selection of return date seven months in the future), and apologies, see Letter of James E. Flaherty, April 2, 1991 (apologizing for absence from status conference due to vision problems exacerbated "during protracted periods of complex legal research" and requesting leniency from court in considering possible future requests for enlargement of time).

But beginning in early 1993 Flaherty apparently became more reluctant to proceed with the litigation. In February 1993 the court set a February 19, 1993 return date for pending motions in Action Two. Flaherty then sought, and the court granted, an extension of time until April 22, 1993 to file a Supplementary Memorandum of Law in opposition to the government's motion. Because of the confusing state of both of these actions, the court at the same time ordered the parties to appear at a status conference to be held April 16, 1993.

At the April 16 status conference, the parties agreed to a schedule for all pending motions. But on April 22, 1993 Flaherty filed a motion in Action Two styled as a "Notice of Motion Relevant to Scheduling" requesting the court 1) to stay all proceedings in that case, or 2) exercise its discretion in settling its calendar so that all motions in Action Two would be

considered after the resolution of his claims in Action One. In a Memorandum and Order dated May 5, 1993 the court denied the motion without prejudice and ordered the parties to appear before Magistrate Judge Caden on June 25, 1993.

On that date Magistrate Judge Caden issued a scheduling order directing that the parties submit dispositive motions and opposition papers in both cases to be returnable before this court October 15, 1993. In a revised scheduling order dated August 17, 1993 the Magistrate Judge, to accommodate Flaherty, changed that return date to October 29, 1993.

But on October 7, 1993 Flaherty wrote to the government explaining that he "does anticipate that he will need additional time" to file dispositive motions and responsive papers. Based on Flaherty's request, the government in a letter dated October 13, 1993 requested that Flaherty telephone the government to set up a new proposed amended schedule.

Flaherty did not telephone the government. Instead, on October 26, 1993 he made an application to the Magistrate Judge for a stay in Action One of the government's pending summary judgment motion "pending production by government of documents under total control of the government." He listed these documents

as "plaintiff's 1986 federal income tax return," "sworn testimony of material witness Capt. Bruce Kopf," and "production by the clerk of the court of the entire original court file of this action."

In a letter to the government dated November 8, 1993 Flaherty stated that "I am currently available for a scheduling conference before the Magistrate on any Friday 1:00 PM, or earlier, beginning with November 26, 1993, except, December 3, 1993, December 10, 1993, December 17, 1993." He then requested that "[w]ith the exception of the November 26, 1993 date, please give me at least two weeks notice . . . ." The letter was not received in the Clerk's Office until November 18, 1993. Notably, the only Fridays remaining in 1993 that Flaherty would be available were the day after Thanksgiving, Christmas Eve, and New Year's Eve. The Magistrate Judge accommodated Flaherty's wishes and scheduled a conference at the earliest possible time consistent with Flaherty's schedule, January 5, 1994.

At the January 5 status conference the Magistrate Judge denied Flaherty's requests for "stays" and additional discovery. The Magistrate Judge ordered that all motions be returnable before this court on April 29, 1994 and that Flaherty submit responsive papers in Action One on or before February 28, 1994 and

in Action Two on or before March 14, 1994. On January 6, 1994 the government sent a letter to Flaherty confirming the same.

On March 9, 1994 Flaherty telephoned Assistant United States Attorney Nancy Miller, the Assistant United States Attorney assigned to Action One, and advised her that he had been unable to comply with the scheduling order and would be submitting an affidavit in support of his motion for an enlargement of time on March 14, 1994. He never did so.

In a letter to the Magistrate Judge dated March 25, 1994, a copy of which was sent to Flaherty, the government stated that "[o]n or about March 9, 1994, Mr. Flaherty advised us that he was unable to comply" with the Magistrate Judge's scheduling order. The government requested a status conference to resolve this matter. The Magistrate Judge scheduled a conference for April 13, 1994.

On March 26, 1994 Flaherty wrote to the government to request an "enlargement of time" to file his papers. He noted several problems that he had in complying with the Magistrate Judge's scheduling order:

> Sometime last fall, in or about October, 1993, I requisitioned the above-captioned file [presumably Actions One, though both actions are listed] for examination and copying at the Clerk's Office, EDNY, but I was only provided with the three most recent folders. At that time, I indicated to the

> clerk's Office, that there appeared to be some 100 documents missing from the file . . . .
>
> Sometime last month, one of my briefcases which contained my papers and notes from [Action One] was taken from the front seat of my car . . . .
>
> The severe winter weather has wreaked havoc with my equipment, and emergency repairs are necessary on [my boat], as to arrest any further damage by the corrosive effects of the salt water which permeated the engine room of that vessel as a consequence of water damage.
>
> I have been sleeping only three or four hours per night to keep up with all the problems . . . .
>
> This [sic] events of the past winter have made me physically and mentally exhausted . . . .

The letter went on to explain that Flaherty has another action pending, Flaherty v. Lang, 93 CV 5636, against various instructors and officials of Suffolk County Community College in front of Chief Judge Platt in Hauppauge that is time-consuming. In support of this point Flaherty attached a copy of an Order to Show Cause which he had filed in that action and said that his required attendance at the hearing on the Order had prevented him from complying with the Magistrate Judge's scheduling order.

On March 28, 1994 Flaherty submitted an affidavit captioned, "plaintiff's affidavit requesting an enlargement of time to complete motion" for summary judgement" in Action One, and "plaintiff's affidavit requesting an enlargement of time to submit papers" in

Action Two. In this affidavit Flaherty stated his usual reasons for requesting an extension of time, including the missing documents, the theft of his briefcase, and his separate pending case in front of Chief Judge Platt.

He also elaborated on the damages to his boat and enclosed photographs. He also listed new reasons for continued delay, including the death of a "material witness," a "visual impairment, in my dominant right eye," "the fact that I am also a student at Suffolk County Community College and I am trying not to fall behind in my school assignments," and "the extreme harsh winter in the Northeast which bred thirteen winter storms."

As proof of the effects of the harsh winter he also enclosed "true copies of repair bills to my 1984 Oldsmobile wherein the odometer readings reflect the fact that I was only able to drive this to [sic] automobile, 340 miles between January 26, 1994 and March 4, 1994." He closes the affidavit:

> Wherefore, I respectfully request that the Court, stay proceedings until at least June 1, 1994, so as to enable me to complete the required emergency repairs, and rewiring, and machinery repair on [my boat], and thereafter, subsequent to access to the entire CV-88-1275 file, grant me ten weeks to submit papers in the above captioned action, consistent with time allocations made by Magistrate Caden in his 1/5/94 order.

The Magistrate Judge read the affidavit and noted on the record of April 13, 1994 that "these explanations are further proof of Mr. Flaherty's intent to delay the court's decision on the merits of substantial motions, filed in cases over 5 1/2 years ago." He then recommended that "in both cases, the government's motions be granted for plaintiff Flaherty's failure to prosecute in good faith."

The parties appeared before this court on April 29, 1994. Flaherty continued to press his motion for an enlargement of time based on his lack of access to what he considers to be the "entire record." He submitted a proposed order, ostensibly made pursuant to 28 U.S.C. § 1735(b), that the government "take steps necessary to restore the lost court files."

On the same date Flaherty filed a "Memorandum of Law in Opposition to Magistrate Caden's Order Dated 4/13/94 Recommending Dismissal of Plaintiff's Cause for Failure to Prosecute." The court considers this document to be objections to the Magistrate Judge's recommendations within the meaning of Federal Rule of Civil Procedure 72.

II

Federal Rule of Civil Procedure 16(f) states in

relevant part:

> If a party . . . fails to obey a scheduling or pretrial order, or . . . fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B),(C),(D).

Fed. R. Civ. Pro. 16(f). Rule 37(b)(2)(C) authorizes the court to make an order "dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party." Fed. R. Civ. Pro. 37(b)(2)(C).

Rule 16(f) was adopted in 1983 as an amendment to Rule 16. Advisory Committee Note, 97 F.R.D. 165, 213 (1983). Although the Court of Appeals for the Second Circuit has not articulated what factors a court must consider in dismissing an action pursuant to Rule 16(f), that court has noted that a Rule 16(f) dismissal is similar to a Rule 37(b) dismissal for failure to comply with a production order, see Salahuddin v. Harris, 782 F.2d 1127, 1133 (2d Cir. 1986) (quoting Advisory Committee Note, 97 F.R.D. at 204-05).

Other courts in this circuit have examined Rule 16(f) dismissals by the standard for dismissal pursuant to Rule 41(b), see Yan v. Kohler, 91 Civ. 1689, 1994 U.S. Dist. LEXIS 1626, at *5 (S.D.N.Y. Feb. 17, 1994). That rule is not squarely applicable to the facts of

this case because it "appears in that part of the Rules concerned with trials." Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197, 207, 78 S. Ct. 1087, 1093 (1958). But some courts have applied it in cases in which a plaintiff's failure to take action for a prolonged period of time caused a delay in the trial readiness of a case, see, e.g., Washington v. Walker, 734 F.2d 1237 (7th Cir. 1984); Lubensolo v. Harley Cars, 124 F.R.D. 64, 66 (S.D.N.Y. 1989). This court will consider both sets of standards.

Dismissal "is a drastic penalty which should be imposed only in extreme circumstances." Israel Aircraft Indus., Ltd. v. Standard Precision, 559 F.2d 203, 208 (2d Cir. 1977); see also National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 96 S. Ct. 2778 (1976); Theilman v. Rutland Hosp., Inc., 455 F.2d 853, 855 (2d Cir. 1972). Dismissal of an action can be appropriate when a party, even a pro se litigant, has failed to comply with court orders or when failure is willful or in bad faith. See, e.g., Bobal v. Rensselaer Polytechnic Inst., 916 F.2d 759 (2d Cir. 1990), cert. denied, 499 U.S. 943, 111 S. Ct. 1404 (1991).

Dismissal should not be imposed unless the failure

to prosecute is due to "willfulness, bad faith, or any fault" of the party. Salahuddin, 782 F.2d at 1132 (quoting Societe Internationale, 357 U.S. at 212, 78 S. Ct. at 1095, and citing National Hockey League, 427 U.S. at 643, 96 S. Ct. at 2781).

In making its determination of dismissal, the court considers whether (1) plaintiff's failures to prosecute have been over a lengthy period, (2) plaintiff had received notice that further delays would result in dismissal, (3) defendant is likely to be prejudiced by further delay, (4) dismissal strikes the appropriate balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard, and (5) lesser sanctions would be ineffective. See Jackson v. City of New York, 93-7895, 1994 U.S. App. LEXIS 8901 at *9 (2d Cir. Apr. 22, 1994) (quoting Alvarez v. Simmons Mkt. Research Bureau, Inc., 839 F.2d 930, 932 (2d Cir. 1988)).

1. The Duration of Plaintiff's Failures

The Court of Appeals for the Second Circuit has noted that this factor has two aspects: (1) that the failures to prosecute were of significant duration, and (2) that these failures were a result of delinquency by

plaintiff. Jackson, 1994 U.S. App. LEXIS 8901 at *10-*11.

Flaherty has delayed this litigation for a period of over one year. His currently pending "motion" for enlargement of time, if granted, would add many months to that time. He shows no signs of willingness to proceed.

Some of the early delay was not the fault of Flaherty, but of the government. See Letters of Assistant United States Attorney Nancy A. Miller, Nov. 24, 1992 (requesting adjournment of return date for pending motion), and Oct. 19, 1993 (noting one-week adjournment at request of Fisheries). Indeed, in a Memorandum and Order dated January 20, 1993 the court expressed its disapproval of the government's conduct, see slip op. at 5 (noting that an argument made by the government was "seemingly interposed 'to harass or to cause . . . needless in crease in the cost of litigation.'"). But regardless of the government's questionable conduct in the past, it is clear that Flaherty is now beyond the pale and is no longer seriously interested in pursuing an adjudication on the merits.

He appears to be saying, in essence, that his failure to prosecute both Actions One and Two is the

result of the fact that several documents are missing from the file of Action One. He says that sometime in fall 1993 he requested that the complete Action One file be sent to the Clerk of the Court in Uniondale so that he could have access to it close to his home. When he received it there, he noted that the first one hundred and eight documents entered on the docket were missing from the file.

On March 2, 1994 Flaherty wrote a letter to the Clerk of the Court inquiring as to the size of the case file. In a letter dated March 10, 1994 the pro se clerk replied that "there are only three files in your case here at the Brooklyn Courthouse."

Flaherty appears to be correct that some older documents, though not as many as the one hundred and eight that he claims, are not in the file. Perhaps they were misplaced on the trip to Uniondale. It is not beyond the realm of possibility that one of the litigants, even Flaherty himself, misplaced them. In any event, the court has searched in every possible place that documents might exist, including central records, its work files, and stacks of courtesy copies, and cannot locate all of the documents.

Flaherty complains only of the absence of documents from the court file in Action One, his action

against Fisheries. But as he correctly points out in his own Memorandum of Law at page 9, the court's review in Action One is limited to evidence in the administrative record. See generally Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S. Ct. 814 (1971).

Flaherty has not shown that any of the missing documents are part of the administrative record. Of the first one hundred and eight documents allegedly missing, he does not specify which, if any, of these are necessary to his case. Many of these one hundred and eight are actually in the file. Moreover, according to the docket sheet nearly one-third (thirty-five) of the first one hundred and eight docket entries are letters or copies of letters Flaherty submitted to the court. In fact, nearly two-thirds of the alleged missing documents of which Flaherty complains appear to be his own frequent and voluminous submissions.

Flaherty claims that his personal copies were in his briefcase that was stolen from his car. However unfortunate this may be, the court is not responsible for Flaherty's lack of diligence to preserve extra copies of his own documents.

Flaherty has at all times had access to the administrative record. Magistrate Judge Caden has

spent many hours pouring through the files, locating all material documents, and certifying copies to ensure its completeness. See Second Supplemental Administrative Record, filed Sept. 3, 1993 (twenty-four documents, including several that are listed in the first one hundred and eight docket entries, added to the record upon agreement by the parties and Magistrate Judge Caden). Magistrate Judge Caden has given Flaherty the benefit of the doubt at every turn.

Flaherty is not materially prejudiced by the absence of documents that the court could not consider in adjudicating his claims. It is clear to this court that he will never have access to the "complete" court file as he envisions it, and that he will continue to use this as an excuse for not proceeding in the litigation.

2. Notice That Further Delays Might Result in Dismissal

Plaintiff in this case received an explicit warning from the Magistrate Judge: a recommendation to this court for dismissal for failure to prosecute in good faith. This court reviews the Magistrate Judge's recommendations de novo, see 28 U.S.C. § 636(b)(1)(C). Accordingly, the court considers the Magistrate Judge's

recommendation to be a warning to Flaherty that if he showed no signs of willingness to progress in good faith his claims would be dismissed.

At no time since the Magistrate Judge's warning has Flaherty shown any signs of willingness to prosecute his claims in good faith. In a status conference to discuss the Magistrate Judge's warning before this court on April 29, 1994 Flaherty only complained about the court file in Action One, and said nothing about Action Two. His written objections of April 29, 1994, complete with references to the Magna Carta, also deal solely with his perceived lack of access to the court file in Action One.

In short, even after the Magistrate Judge's explicit warning of dismissal Flaherty continued not to prosecute these cases in good faith.

3. Further Delays Are Likely to Prejudice Defendants

The government will be prejudiced by further delay. The government has devoted significant resources to these six-year-old cases, with dispositive motions pending for as long as three years. Because the court determines that Flaherty's delay has been unreasonable, prejudice to the government is presumed.

Lyell Theatre Corp v. Loews Corp., 682 F.2d 37, 43 (2d Cir. 1982) (citing Citizens Utilities Co. v. American Telephone & Telegraph Co., 595 F.2d 1171, 1174 (9th Cir.), cert. denied, 444 U.S. 931, 100 S. Ct. 273 (1979).

4. Balancing Court Congestion With Flaherty's Due Process

These cases have been pending in this court for six years. The court has devoted considerable time to these cases, which are part of this court's extremely crowded docket.

Of course, this concern must be balanced against Flaherty's right to due process. Flaherty has been granted ample opportunity to litigate his claims, but even in the face of repeated rebukes by the Magistrate Judge, he has refused to proceed. Recognizing that dismissal is a drastic remedy, see Theilman, supra, 455 F.2d at 855, the court determines that due to Flaherty's disregard for the orders of this court and his aim to delay this litigation, dismissal is warranted.

The dismissal in Action Two is only a dismissal of Flaherty's counterclaims and third-party claims and not the entry of default judgment against him in that

action. If he wishes, Flaherty may defend against the government's foreclosure claims in Action Two.

5. Consideration of Lesser Sanctions

The court determines that lesser sanctions would be inappropriate in this case. Flaherty has litigated these cases under his own concepts of civil procedure, deliberately obstructing the judicial process with his pleadings.

The Court of Appeals for the Second Circuit has stated that "pro se plaintiffs do in fact often 'frustrate the processes of litigation,' but dismissal is justified only when they do so deliberately, not when they do so through misunderstanding.'" Salahuddin, supra, 782 F.2d at 1132 (quoting Weiss v. Bonsal, 344 F.2d 428, 430 (2d Cir. 1965) (per curiam)). Flaherty's frustration of the process is not the result of his misunderstanding of the law.

He has ignored scheduling orders as long as he can and then interposed numerous requests for enlargements of time and motions to amend long-forgotten orders. His reasons stated in his letters and "motions" are a mere pretext to delay the litigation. His voluminous submissions relating to and explaining his requests for extensions and enlargements belie his claim that he has

no time to respond to the merits of the claims in this litigation.

His refusal to proceed with his counterclaims in Action Two because of completely unrelated factors in Action One cannot be justified. His letter of November 8, 1993, making himself unavailable in effect for nearly two months, is nothing short of disingenuous.

In sum, no lesser sanction than dismissal would be sufficiently potent. Any other measure would be ineffectual and would only serve to delay further these cases.

III

Magistrate Judge Caden and this court have made patient and repeated efforts to provide plaintiff with every opportunity to prosecute his claims. Enough is enough.

Based on the Report and Recommendation of Magistrate Judge John L. Caden and upon the motions of the government, the court dismisses defendants' counterclaims and third-party claims in Action Two, 88 CV 3275. The court also dismisses all claims in Action One, 88 CV 1275.

The Clerk of the Court is directed to remove 88 CV 1275 from the docket.

So ordered.

Dated: Brooklyn, New York
May 12, 1994

Eugene H. Nickerson

Eugene H. Nickerson, U.S.D.J.

# APPENDIX D

**Civil Action No. CV-88-1275, 1993**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

JAMES E. FLAHERTY, 88-CV-1275

Plaintiff, MEMORANDUM AND ORDER

-against-

NATIONAL MARINE FISHERIES SERVICE, Financial Services Division, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, UNITED STATES DEPARTMENT OF COMMERCE, C WILLIAM VERITY, in his official capacity as Secretary of Commerce, WILLIAM EVANS in his official capacity as Assistant Administrator for Fisheries, JAMES E. DOUGLAS, Jr., in his official capacity as Acting Assistant Administrator for Fisheries, MICHAEL L. GRABLE, in his official capacity as Chief, Financial Services Division, National Marine Fisheries Service, CHARLES L. COOPER, in his official capacity as Program Leader, National Marine Fisheries Service,

Defendants.

----------x

JAMES E. FLAHERTY
Plaintiff pro se.

ANDREW J. MALONEY, United States Attorney
(Nancy A. Miller, of Counsel)
Brooklyn, New York.
Attorney for Defendant.

NICKERSON, District Judge:

James E. Flaherty, Plaintiff pro se brought this action against the national Marine Fisheries Service, ("Fisheries"), challenging its denial of his application for compensation for lost fishing gear under the Fisherman's Protective Act, 22 U.S.C. § 1980.

Flaherty moves to serve a supplemental complaint pursuant to Rule 15(d) of the Federal Rules of Civil Procedure.

I

The background facts may be briefly summarized.

Flaherty is a lobsterman who allegedly lost 71% of his 900 lobster pots when another fishing vessel dragged its nets over his pots in 1986.

He timely filed a claim with Fisheries for compensation under the Fisherman's Protective Act. His claim was denied and he filed this action.

In Memorandum and Order dated October 13, 1988, familiarity of which is assumed, the court denied defendant's motion to dismiss and remanded the case to the agency for further articulation of the reasons it denied plaintiff's claim.

Flaherty v. National Marine Fisheries Service, 697 F.Supp. 127 (E.D.N.Y. 1988) In a letter to plaintiff dated February 1, 1989, Fisheries complied with the court's order and again denied Flaherty' s claim.

Defendants moved for summary judgment; plaintiff cross-moved (1) to expand the administrative record to include prior applications for compensation from Fisheries; (2) to consolidate this action with a foreclosure action on a Small Business Administration loan; (3) for leave to amend the Complaint. In a Memorandum and order dated May 9, 1991, familiarity with which is assumed, the court denied all motions and remanded the case to Fisheries for further

proceedings.

The Court informed Flaherty then that if he "wishes to seek review of Fisheries decision following the remand and still wishes to amend the complaint, he may make the request again." Slip. at 15.

The court further ordered Fisheries to consider whatever additional factual information Flaherty wished to submit,or explain why it had not considered such additional information. Id.

Fisheries moved to reargue the motion. This motion was denied on march 10, 1992. In a letter to Flaherty dated August 24, 1992 Fisheries again determined that he was not entitled to compensation in any amount.

On October 29, 1992, believing that the agency had issued its final determination, Flaherty filed this motion for leave to file a supplemental complaint. On December 16, 1992, Fisheries issued yet another letter, providing additional reasons for denying Flaherty's claim.

II

Rule 15(d0 of the federal Rules of Civil Procedure provides in pertinent part:

> "Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented,"

The decision to grant or deny a motion for

leave to file a supplemental complaint rests within the sound discretion of the trial court. Friedman v. Typhoon Air Conditioning Co ., 31 F.R.D. 287, 289 (E.D.N.Y. 1962)

The government opposes Flaherty's motion for three reasons. First it contends that the motion to serve a supplemental complaint is premature because the motion was submitted before fisheries issued its final determination.

The motion is no longer premature if it ever was. When Fisheries rejected Flaherty's claim in August 1992, Flaherty reasonably concluded that Fisheries had made a final decision. The government offered him no evidence that his claim

was still under review until December 18, 1992, when counsel for the government stated in open court that Fisheries had just issued a letter to Flaherty on December 16, 1992. In any event, Fisheries has now issued what it describes as a "final determination."

Second, the government contends that the proposed supplemental complaint fails to comport with the parameters of Rule 15(d0 because it fails to set forth newly occurring events.

This misrepresents Flaherty's submission. The proposed supplementary complaint and exhibits, together with an accompanying affidavit and exhibits, document the evidence that Flaherty did

or attempted to provide to Fisheries in support of his claim. Insofar as his submission supplements the administrative record, it is relevant to the court's review of Fisheries final determination denying his claim.

Last, the government contends that Flaherty's motion should be denied because he failed to serve or file a memorandum of law in support of the pending motion. This argument is frivolous. The court knows of no authority holding that a pro-se plaintiff must submit a memorandum of law in order to submit a supplemental pleading, This argument was seemingly interposed "to harass or to cause. . . needless increase in the cost of litigation."

Fed. R. Civ. P. 11

In any event, in reply Flaherty diligently prepared and submitted a two volume memorandum of law in support of his motion, together with a two volume "Table of Cases".

Plaintiff's motion for leave to file the supplemental complaint is granted.

So ordered.

Dated: Brooklyn, New York
January 28, 1993

s/ Eugene H. Nickerson, U.S.D.J.

## APPENDIX E

**Civil Action No. CV-88-1275, 1991**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

JAMES E. FLAHERTY,

88-CV-1275

Plaintiff,

MEMORANDUM AND ORDER

-against-

NATIONAL MARINE FISHERIES SERVICE, Financial Services Division, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, UNITED STATES DEPARTMENT OF COMMERCE, C WILLIAM VERITY, in his official capacity as Secretary of Commerce, WILLIAM EVANS in his official capacity as Assistant Administrator for Fisheries, JAMES E. DOUGLAS, Jr., in his official capacity as Acting Assistant Administrator for Fisheries, MICHAEL L. GRABLE, in his official capacity as Chief, Financial Services Division, National Marine Fisheries Service, CHARLES L. COOPER, in his official capacity as Program Leader, National Marine Fisheries Service,

Defendants.

----------x

JAMES E. FLAHERTY
42 Neptune Avenue
Hampton Bays, New York, 11946
Plaintiff pro se.

ANDREW J. MALONEY, United States Attorney
(Nancy A. Miller, of Counsel)
Brooklyn, New York.
Attorney for Defendant.

NICKERSON, District Judge:

Plaintiff brought this action against the National Marine Fisheries Service ("Fisheries"). He challenges its denial of Plaintiff's application for compensation for lost fishing gear under the Fisherman's Protective Act, 22 U.S.C . §1980. In a Memorandum & Order dated October 13, 1988, familiarity with which is assumed, the Court denied defendants motion to dismiss and remanded the

case to the agency for further articulation of the reasons it denied plaintiff's claim. Flaherty v. National Marine Fisheries Service, 697 F. Supp. 127, (EDNY, 1988). In a letter to plaintiff dated February 1, 1989, Fisheries complied with the court's order.

Defendants now move for summary judgment. Plaintiff cross-moves 1) to expand the administrative record to include prior applications for compensation from Fisheries; 2) to consolidate this action with United States v. Flaherty , Civ. 88-3275, a foreclosure action on a Small Business Administration loan; and 3) for leave to amend the complaint

I

Plaintiff is a commercial lobsterman. He claims that on December 17, 1986 another fishing vessel dragged its nets over his lobster pots, causing a loss of 636 of the 900 pots deployed. On January 13, 1987, plaintiff filed a claim with Fisheries for compensation from the Fishing Vessel and Gear Damage Compensation Fund. ("the Fund")

The fund was established by Congress to compensate commercial fisherman for damage to vessels and fishing gear caused by foreign vessels and for damage to fishing gear caused by domestic or foreign vessels. See 22 U.S.C .§1980

The regulations governing the applications to

the Fund, the Fisherman's Protective Act Procedures, no longer appear in the Code of Federal regulations but remain in force and can be found at 46 Fed. Reg. 58804 (1981). As required by those regulations plaintiff submitted supporting documentation including statements of the incident by Vincent Malandrucca, invoices from suppliers of the lost gear, proof of payment to some of those suppliers, and estimates for replacement.

Fisheries sought additional information from Plaintiff. It requested a copy of his 1986 tax return and or copies of trip tickets for the trips immediately preceding the casualty to verify that his income was sufficiently large to correlate with a

deployment of 900 traps. Plaintiff refused to produce his tax return. He eventually produced copies of tickets for trips preceding the casualty and for the trip during which he discovered it, under protest, claiming that the low dollar amount of his catches was irrelevant to the number of traps deployed.

Fisheries also attempted to contact Mr. Malandrucca but was informed by Plaintiff that he left no forwarding address. Plaintiff then told the agency that there was another witness, William Staiger. Fisheries contacted Staiger and received an affidavit from him concerning the incident..

The agency also contacted plaintiff about the

invoice from Atlantic Fisherman's Supply ("Atlantic"). The invoice indicted that Atlantic had charged the plaintiff $31,305 for rigging 450 traps and for provision of other equipment. Plaintiff had not submitted proof of payment of this invoice. At plaintiff's suggestion, Fisheries wrote Atlantic for confirmation of the transaction. It received a letter back, signed only B.G., saying that the amount due on the invoice was subtracted from a credit plaintiff had with the firm.

Fisheries subsequently learned that the Post Office Box on Atlantic's letter head was registered to William Staiger, the aforementioned alternative witness to the incident.

In September 1987, Fisheries deposed Mr. Staiger. He testified to the following: that the casualty occurred and the loss was of the magnitude claimed by plaintiff; that he was the proprietor of Atlantic Fisherman's Supply but also made a living doing other jobs such as plumbing and refrigeration; that the plaintiff was the only customer of Atlantic; and that the credit for $31,m305 was the result of plaintiff's lease to Staiger of a house, Staiger's charter of the Shannon Kathleen, and the plaintiff's transfer to Staiger of some lobsters.

Plaintiff later claimed to Fisheries that the house lease to Fisheries was worth $5,800, the

charter was worth $16,479, and the lobsters were worth $16,972, and the lobsters were worth $16,972.

On October 23, 1987, Fisheries issued its initial determination denying plaintiff's claim. The denial was on the ground that plaintiff had not sufficiently proven that 1) he had deployed 900 pots and 20 he had paid Atlantic $31,305 for the rigging of 450 pots or that Atlantic had actually rigged the pots.

The determination letter elaborated that Plaintiff had not yet provided sufficient proof that he operated a lobstering business of the scale claimed. It said that the transaction with atlantic

was suspect because 1) Atlantic was not a known gear supplier and had as its only customer Mr. Flaherty; 2) there was almost no cash exchanged between plaintiff and Atlantic; 3) there was no corroborative evidence that Mr. Staiger occupied the house , used the boat, or received lobsters and 4) there was was no corroborative evidence that Atlantic acquired the necessary goods to perform the services for plaintiff.

Plaintiff appealed the initial determination. As permitted by §258.38(c) of the regulations, he submitted additional evidence. Plaintiff tried to corroborate the house lease by submitting affidavits from real estate brokers

which said the lease of the house was reasonably valued at $5,800 and an affidavit by Mr. Staiger saying that he leased the property and lived there. He tried to corroborate the boat charter by submitting a copy of the charter of the vessel, an affidavit by a mechanic saying that he had been on it with both plaintiff and Mr. Staiger, and it was in good operating condition, and an affidavit from a commercial banker saying that $19,280 was a reasonable annual charter rate for the vessel. Plaintiff also submitted a Suffolk County business certificate for Atlantic.

Along with this additional evidence, plaintiff also submitted a brief which said among other

things that since Fisheries "expressed a preference that Atlantic be paid in coin of the realm" he had restructured the terms of payment to Atlantic. Now payment would be as follows:

1. rental of house.....$7,780.00

2. vessel charter.....$8,984.00

3. cash payments.....$11,000.00

4. Miscellaneous.....675.00

After these payments Atlantic would still be owed $2,276 which would be erased by Staiger's future use of the house and the boat. Plaintiff forwarded to Fisheries copies of canceled checks to Atlantic totaling $11,000.

On March 25, 1988, Fisheries denied

plaintiff's appeal of the initial determination. The agency did not elaborate on the initial determination. Fisheries merely restated the findings it had made in making the initial determination.

Plaintiff then began this action. The complaint alleged that the denial of his claim was in contravention of the Fisherman';s Protective Act, 22 U.S.C.§1971, and the Administrative Procedure Act, 5 U.S.C. §706 et seq., and deprived plaintiff of due process protected by the Fifth Amendment. The court ordered Fisheries to further articulate its reasons for denying Plaintiff's claim. Flaherty V. National Marine Fisheries Service, 697 F. Supp.

127, (EDNY 1988)

On February 9, 1989, Fisheries sent plaintiff a five page letter fully explaining its decision. it said that the submitted evidence of a 900 pot deployment was not sufficient because the affidavit of Mr. Malandrucca was defective in that the notary whose stamp was affixed did not sign the document and could not be located; the affidavit of Mr. Staiger was unreliable because his interests were intertwined with the plaintiff such that the agency considered him an interested witness; the trip tickets were not of a sufficient dollar amount to corroborate such a large operation and plaintiff had refused to supply other documentation of the size

of his operation such as tax returns; and that plaintiff's proof that he purchased over 900 traps was not proof that he deployed that number.

With regard to the transaction between plaintiff and Staiger, Fisheries first reviewed the first set of proofs--the transfer of the house lease, boat charter, and lobsters to Staiger. the agency concluded it was not regular and was uncorroborated and could have been a post facto construction.

It found that the plaintiff had not proven that the rental of the value of the house was $5,800 annually because the affidavits from the real estate brokers did not go so far as to say that he had been

able to rent the property for that price. Nor did Fisheries choose to accept Staiger's representation that he actually used the house. It suggested that acceptable proof would have been mail receive there or school records with that address for Staiger's son.

Fisheries similarly concluded that there was no adequate proof that Staiger had used the boat. it noted that the mechanics affidavit did not say whether Staiger had used the boat on other occasions. Fisheries faulted the affidavit from the banker which said that the charter fee was reasonable because he was Flaherty's father in law.

Fisheries noted that plaintiff had abandoned

his contention that lobsters were part of the payment package and instead had issued checks to Atlantic totaling $11,000.00. The agency said that this indicated that plaintiff was either untruthful, when he had earlier claimed to have given Atlantic $16,972.00 worth of lobsters or that plaintiff had given Atlantic the lobsters plus cash which would have resulted in an overpayment of the invoice.

Fisheries also addressed its concern that Atlantic was not a recognized gear supplier. It said that plaintiff's submission of Atlantic's business certificate was insufficient because it did not demonstrate that Atlantic had other customers or that it had ever purchased the gear that it

purportedly resold to the plaintiff. it also noted that the business certificate was only eight days old before the dated of the Atlantic invoice to Flaherty.

II

Defendants have moved for summary judgment. The agency's decision will be affirmed if it is " 'based on a consideration of relevant factors' and there was no 'clear error of judgment.' " Flaherty v National Marine Fisheries Service , 697 F. Supp. 127,131 (E.D.N.Y. 1988) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824 (1971)). The Court will not "substitute its own judgment for that of the agency" Citizens to Preserve Overton Park; 401 U.S. 402,

416, 91 S.Ct. 814, 824.

As a preliminary matter, the court must restrict its analysis of the propriety of the administrative action to the grounds invoked by the agency. SEC v. Chenery Corp., 332 U.S. 194, 196, 67 S.Ct. 1575,1577 (1947) The court will not consider the government's arguments that the decision was correct because plaintiff did not adequately establish that a casualty occurred, or because the replacement estimates submitted were inadequate.

Fisheries properly determined that there was insufficient proof that plaintiff operated 900 pots. Plaintiff did not offer reliable proof on this issue.

The agency was justified in disregarding the

affidavit of William Staiger, whose interests it justifiably concluded were too intertwined with those of the plaintiff to allow him to be an objective witness. Fisheries' own expert judgment that the trip tickets submitted by the plaintiff did not correspond with the deployment of the magnitude claimed is entitled to the court's deference. Plaintiff refused to submit other evidence that would corroborate the size of his operation.

Fisheries also properly determined that there was insufficient proof that the $31,305 plaintiff claimed to have paid Atlantic for the rigging of 450 lobster pots was spent or that the pots were actually rigged. The transaction did not appear to

be in line with usual business practices. Besides, there was little proof submitted besides the participant's own representations that Staiger actually received payment for this transaction. The agency as justified in declining to accept Staiger's \ word that he lived in the house, used the vessel, or received lobsters.

Plaintiff claims that Fisheries analyzed his claim differently than it did in approving his prior claims. But nothing prevents an administrative agency from scrutinizing one claim more carefully than it does others, so long as it does so for a rational reason. Cf. Monsanto v. Kennedy , 613 F.2d. 947,956 (D.C. Cir.1979) (proper for agency to

"Shift lens of...microscope to higher power" when examining claim so long as final decision is within limits of its discretion). Fisheries says that it closely analyzed this claim because it was abnormally large.

The agency was not justified in compensating plaintiff for full amount claimed. But plaintiff presented credible and unchallenged evidence in the form of invoices, trip tickets, that he purchased and deployed at least some lobster traps. Plaintiff is also entitled to a presumption, one that Fisheries has not rebutted, that a casualty did occur. See Fund Regulations §258.34. Presumably the agency could have estimated how many pots the plaintiff

deployed both before and after the casualty. But Fisheries did not do so--it found only that that the tickets did not corroborate with a 900 pot deployment. As the record stands now, plaintiff seems entitled to some compensation and the agency's decision to reject the claim is without basis.

The court cannot determine the compensation, of any, to which plaintiff is entitled. The claim is therefore again remanded to the Fisheries Service. The agency is directed to reconsider the claim and either award plaintiff partial compensation or explain why he is entitled to nothing. Fisheries need not reconsider its decisions that plaintiff is not

entitled to the full amount claimed or that plaintiff did not and now cannot prove that Atlantic Fisherman's Supply rigged 450 lobster traps in exchange for payment of $31,305 in cash or other items of value. The court has reviewed these decisions and found them proper.

III

Plaintiff has cross-moved to consolidate this action with another pending action before this judge, United States v. Flaherty , Civ. No. 88-3275. In the other action, United States seeks to foreclose on three notes and accompanying mortgages between the plaintiff and the Small Business Administration.

Rule 42(a) of the Federal Rules of Civil Procedure provides that the court may consolidate multiple actions if they involve common questions of law and fact. Plaintiff says both actions have common parties and both arise from the gear loss and Fisheries' failure to compensate plaintiff for it. But he fails to identify, nor do their appear to be, specific issues of law or fact common to both actions. consolidation appears neither necessary or expedient.

IV

Plaintiff also cross-moves for leave to file an amended or supplemental complaint. He seeks to amend the complaint to include new facts, namely

statistics compiled by the New York State Department of Environmental Conservation concerning the relationship between lobster catch and effort, and to expand the relief requested to include "similarly Situated New York State Lobster Pot Fishermen" or alternatively a finding by the court that Fisheries discriminated against plaintiff as compared to the aforementioned fellow lobstermen.

In light of the remand, the court declines to consider the plaintiff's request. If Plaintiff wishes to seek review of Fisheries decision following remand and still wishes to amend the complaint, he may make the request again. Any factual information

plaintiff considers relevant should be submitted to the agency. Fisheries will either consider it or explain why it did not.

VI

Plaintiff also cross-moves to expand the Administrative record to include: 1) his prior claim applications to Fisheries; 2) the Fisheries determinations approving the prior claims; 3) additional correspondence concerning this claim; 4) a transcribed statement by Staiger to Flaherty; 5) a newly notarized copy of the Malandrucca eyewitness statement.

As discussed above, plaintiff's prior applications and Fisheries prior approvals are not relevant to the issues in this case. Fisheries has

already expanded the record to include the correspondence and the Staiger Statement. If plaintiff believes that the Malandrucca statement is relevant to whether he is entitled to compensation, he should submit to for the agency's review.

VI

The United States motion for summary judgment is denied. Plaintiff's cross-motions are also denied. the case is remanded to the National Marine Fisheries Service for further proceedings not inconsistent with this Memorandum and order.

So Ordered.

Dated: Brooklyn, New York
May 9, 1991

s/ Eugene H. Nickerson, U.S.D.J.

# APPENDIX F

**697 F. Supp 127 EDNY CV-88-1275,10/13/88**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

JAMES E. FLAHERTY,

88-CV-1275

Plaintiff,

MEMORANDUM AND ORDER

-against-

NATIONAL MARINE FISHERIES SERVICE, Financial Services Division, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, UNITED STATES DEPARTMENT OF COMMERCE, C WILLIAM VERITY, in his official capacity as Secretary of Commerce, WILLIAM EVANS in his official capacity as Assistant Administrator for Fisheries, JAMES E. DOUGLAS, Jr., in his official capacity as Acting Assistant Administrator for Fisheries, MICHAEL L. GRABLE, in his official capacity as Chief, Financial Services Division, National Marine Fisheries Service, CHARLES L. COOPER, in his official capacity as Program Leader, National Marine Fisheries Service,

Defendants.

----------x

JAMES E. FLAHERTY
Hampton Bays, New York
Plaintiff pro se.

ANDREW J. MALONEY, United States Attorney
(Yvette Rivera, Assistant United States Attorney, of Counsel)
Brooklyn, New York.
Attorney for Defendant.

NICKERSON, District Judge:

Plaintiff, an offshore commercial lobsterman, brought this action pro se against the National Marine Fisheries Service, Financial Services Division, (Fisheries), and the other named defendants under the Administrative Procedure Act, 5 U.S.C. §§701-06 (1982) (the APA), the Fisherman's Protective Act, 22 U.S.C. §1971 et seq. (1982) (the Act), and the due process clause of the

Fifth Amendment.

The complaint alleges that Fisheries, upon receipt of plaintiff's application for compensation from the Fishing Vessel and Gear Damage Compensation Fund (the Fund), see 22 U.S.C. §1980(f), for the loss of 636 lobster pots, unlawfully failed to consider all evidence presented by plaintiff in his application and falsely asserted that complete prepayment of invoice from supplier who rigged traps was a prerequisite to compensation. These actions were, in plaintiff's view, "arbitrary and capricious" within the meaning of 5 U.S.C. §706(2)(A) and a denial of his due process rights under the fifth amendment.

Plaintiff further alleges that Fisheries violated his right under the applicable regulations to a rebuttable presumption of loss, see 50 C.F.R.§258.34(b), (c) 1986, and failed to notify plaintiff of any deficiency in his application as required by 50 C.F.R. §258.33(m). 50 C.F.R. § 258 has since been transferred to 22 C.F.R. §33. Fisherman's Protective Fund; Transfer of Administration, 52 Fed. Reg. 7533 (1987). Since the regulations have not yet appeared in their new location, however this opinion will refer to the original section number.

The complaint prays for declaratory and injunctive relief, including a vacation of Fisheries

"final determination" on plaintiff's application and a remand to the Administrator for Fisheries for reconsideration.

Defendants have moved to dismiss the complaint under Fed. R. Civ. Pro. 12(b)(1) for lack of subject matter jurisdiction on two grounds: (1) plaintiff's request for declaratory and injunctive relief is in effect a disguised monetary claim for more than $10,000, over which the district court has not jurisdiction, 28 U.S.C. §§1346, 1491; and in the alternative, (2) the APA precludes judicial review of the agency's action because that action is committed to absolute discretion of the agency. 5 U.S.C.§701(a)(2)

Plaintiff claims that about December 17, 1986, he discovered the loss of 636 lobster pots out of a total of 900 deployed. On January 10, 1987, he submitted to Fisheries a claim for $64,436 against the Fund for his lost gear. On October 23, 1987, Fisheries issued an initial determination disallowing his claim. Plaintiff filed an administrative appeal pursuant to 50 C.F.R. 258.38(b) on November 22, 1987.

He supplemented his claim with additional written data under 50 C.F.R. § 258.38(c) on January 23, 1988. On March 25, 1988 Fisheries issued a final determination denying plaintiff's claim. Plaintiff then brought this action.

Section 10 of the Act at 22 U.S.C. §1980, as amended, establishes a system for compensating American fishermen for the loss of vessels or gear due to the activities of foreign fishermen operating within 200 miles of the United States. The statute grants broad discretion to the secretary of Commerce to prescribe the manner in which application for and determination of compensation shall be made. 22 .S.C. §1980(c), (d) . The question is whether a district court may review the exercise of of this discretion.

## I The Tucker Act

The doctrine of sovereign immunity bars suit against federal agencies and officials unless

Congress has waived immunity by statute. United States v. Testan 424 U. S. 392, 399 (1976). The Tucker Act, which defines the terms on which Congress has waived the immunity of the United States, vests exclusive jurisdiction over claims for damages exceeding $10,000 in the Claims Court, 28 U.S.C. §§1346(b), 1491. See e.g.Hahn v. United States, 757 F.2d 581, 586 (3d Cir. 1985).

Defendants claim that plaintiff's prayer for declaratory and injunctive relief is a disguised claim for monetary damages of $64,436. They point out that where the "prime objective of the plaintiff is to obtain money from the government," plaintiff cannot avoid the jurisdiction of the Claims

Court by framing his complaint as a request for declaratory and injunctive relief. B.K. Instruments, Inc., v. United States, 715 F.2d 713, 727 (2d Cir. (1983). If defendants' characterization of the plaintiff's action is correct then this court should dismiss the action for lack of subject matter jurisdiction.

Plaintiff argues that his "prime objective" is not to obtain damages, but to have his case remanded to Fisheries for reconsideration in a lawful manner. Indeed, plaintiff admits that this court has no power to grant him money damages.

The complaint does not ask the court to grant a monetary award. Plaintiff's ultimate objective,

however is a monetary compensation from the United States government for his lost gear. The exclusive jurisdiction of the Claims Court cannot be circumvented "merely by naming a Government officer as a defendant and praying for an injunction that the money of the United States, in its treasury, be paid by the named defendant." Hoopa Valley Tribe v. United States , 219 Cl. Ct. 492, 492, 596 F.2d 435, 443 (1979). But that is not what the plaintiff has done.

Despite the rather broad language of B.K. Instruments, supra , "district court jurisdiction cannot be foreclosed by the fact that it may later be the basis of an award for damages against the

United States." Hahn v. United States, supra, at 589. In this case, plaintiff does not ask the court to direct payment of any monies or to determine the amount to which he is entitled. He merely seeks an order vacating the final determination and ordering Fisheries to reconsider his application. The Second Circuit has held that a complaint " seeking an order requiring lawful agency consideration of the [plaintiff's] application, rather than a direct award of funds,' is properly within the jurisdiction of the district court. Allan Guttmacher Institute v. MacPherson, 805 F.2d 1088, 1096 (2d Cir. 1986)

Although the plaintiff's goal is undoubtedly to obtain compensation from the government, the

relief he requests would not be the equivalent of obtaining money damages." B.K. Instruments, supra , at 727. If the court were to order a remand of plaintiff's case, Fisheries would have discretion, within legal limits, to determine whether plaintiff is entitled to compensation and, if so how much. Plaintiff's complaint is thus not merely a disguised claim for damages exceeding $10,0000 within the exclusive jurisdiction of the claims court.

II Agency Discretion

Although the Tucker Act does not bar jurisdiction, this court cannot review defendants' action on plaintiff's application unless Congress has also waived the sovereign immunity of the United

States under the APA.

Defendants argue that the Act commits the determination of eligibility for compensation to the absolute discretion of the Chief of Fisheries and precludes judicial review= of that determination. See 5. U.S.C. §701(a)(2). Citing Heckler v. Chaney , 470 U.S. 821, 830 (1985), they contend that the Act is so broadly drawn as to give the court no meaningful standard to by which to judge the agency's exercise of discretion. Defendants also claim that Congress's use of the phrase "final determination"22 U.S.C. §1980(d)(4), to describe the last stage of administrative review indicates Congress's intent to preclude judicial review.

Plaintiff urges that the Act and regulations provide clear standards for review, and that defendants have failed to meet those standards. Specifically, he points to their alleged failure to meet deadlines under 22 U.S.C. §1980(a)(1), and properly to rebut the presumption of causation by a foreign vessel imposed by 50 C.F.R. §258.34. Plaintiff also disputes the government's interpretation of the "final determination" language in the statute, arguing that it simply refers to the stage at which the administrative remedies are exhausted.

The Act's reference to the "final determination" seems more plausibly to indicate

the last stage in the administrative process rather than to preclude judicial review. Nothing in the statute explicitly or implicitly indicates Congressional purpose to preclude judicial review within the meaning of 5 U.S.C. §701(a)(1). Although the statute does not explicitly provide for review, such review "will not be cut off unless their is persuasive reason to believe that such was the purpose of Congress." Abbott Laboratories v. Gardiner, 387 U.S. 136, 140 (1967). NO such reason is present here.

The limitation in 5 U.S.C. §701(a)(2), precluding review to the extent that "agency action is committed to agency discretion by law," poses

more difficult question. The Supreme Court has described this exception to the general availability of judicial review as "very narrow" and "rare" Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). Administrative action is usually reviewable unless "'either (a) congressional intent is discernible to make it unreviewable, or (b) the subject matter is for some reason inappropriate for judicial consideration.'" Langevin v. Chenago Court, Inc., 447 F. 2d 296, 303 (2d Cir. 1971) (quoting K. Davis, Administrative Law Treatise §28.16, at 965 (Supp. 1970).

The legislative history refers repeatedly to the compensation program as a "modified no-fault

system." See 124 Cong. Rec. 9280-81 (1978); H.R. Rep. No. 1029 95th Cong., 2d Sess. 14 (1978). Perhaps the use of this phrase suggests, as the government argues, that efficient consideration of claims is to be valued over thorough review. But more likely the phrase describes the program as eliminating the need for fishermen to identify and sue the vessel that caused the damage to their own ship or gear. The subject matter is certainly appropriate for judicial consideration. It involves straightforward inquiry, to which the federal courts are accustomed, into factual basis for an agency adjudication.

In Heckler v. Chaney, supra, at 830 the

Supreme Court indicated that an action is committed to agency discretion when there is "no meaningful standard against which to judge the agency's exercise of discretion"--i.e., it is "impossible" to say that the agency has abused its discretion under 5 U.S.C. §706(2)(A) It is not "impossible" under any circumstances to determine whether Fisheries abused its discretion under the Act.

It is true that the statute, like many others, does not provide explicit guidelines for agency action. It grants Fisheries broad discretion to determine the form and manner of application for compensation, see 22 U.S.C. §1980(c), (d), and does

not say how individual claims are to be determined. But it clearly specifies who is to be eligible for compensation. see 22 U.S.C. §1980(b).Fisheries is not free to deny compensation to claimants who qualify for it and comply with Fisheries' own procedural regulations. See, e.g., Service v. Dulles, 354 U.S. 363 (1957).

Although this court may not substitute its judgment for that of Fisheries, it must make a "searching and careful" inquiry into the facts to determine that the agency's decision was "based on a consideration into relevant factors" and that there was no "clear error of judgment." Citizens to Preserve Overton Park v. Volpe, supra, at 416.

This standard for review, although "narrow," id., is nonetheless "meaningful" and judicially manageable.

The court concludes that it has jurisdiction to review the actions of Fisheries to determine whether its decision met that standard.

However the decision of Fisheries is couched in such terms as to make it impossible for the Court to fulfill its responsibility to review. Plaintiff alleges that he has provided Fisheries with all of the evidence required under the regulations and requested by Fisheries, The exhibits to plaintiff's complaint, including correspondence between him and various Fisheries officials and the affidavits,

invoices, canceled checks, and the like, offered by plaintiff, appear to bear out his claim.

Fisheries final determination, dated March 25, 1988, denied his application in the following words:

> "Our analysis reveals that you did not provide acceptable corroborative evidence showing that you had deployed and operated 900 pots prior to a loss of 636 pots on December 17, 1986. In addition, you failed to prove that 636 pots were lost on that date. Furthermore you did not provide acceptable proof that a $31,305 transaction for the rigging of 450 of your pots actually occurred, or that the pots were actually rigged."

This determination simply restates the reasons for denial offered in the initial determination.

In reviewing an administrative

determination, we must "judge the propriety of such action solely by the grounds invoked by the agency." SEC V. Chenry Corp., 332 U.S. 194, 196 (1947) The basis for the agency's action must be clear. Id. at 1960197 it is unclear to the court in what respect plaintiff's proffered evidence is inadequate to establish the facts mentioned in the final determination. he submitted affidavits, depositions, paid invoices, canceled checks, and trip tickets to substantiate the deployment of 900 traps and the loss of 636 traps.

This evidence appears to be in the form prescribed by 50 C.F.R. §258.33 and the requests of Fisheries, and none of it strikes us as flimsy or

incredible on its face. The $31,305 transaction is somewhat more difficult to verify because plaintiff paid for the rigging partially in kind. But he submitted affidavits attesting to the performance of the rigging and the value of the goods and services exchanged for the rigging, as well as invoices, canceled checks, and copies of the leases for a cottage and a boat that constituted part of the compensation for the rigging. This evidence seems to satisfy the regulations and Fisheries obvious need to weed out spurious claims.

The final determination does not specify why plaintiff's proofs were judged insufficient. Without knowing the reasons for the purported

inadequacy of plaintiff's evidence, the court cannot be certain that the determination was within the range of discretion granted the agency by Congress within the meaning of 5 U.S.C. §701(a)(2). The court therefore will remand to Fisheries for further articulation of its reasons for denying plaintiff's claim. See, e.g. Camp v. Pitts, 401 U.S. 138, 142-43 (1973); Citizens to Preserve Overton Park, Inc., v. Volpe, supra, at 420.

Since plaintiff is acting pro-se, the court will note that the alleged delay in processing plaintiff's application and the presumption of causation are no longer at issue. The regulations afford an applicant a presumption that an unobserved casualty was

caused by a foreign vessel rather than by weather or natural causes for which compensation is unavailable. 50 C,F.R.§258.34(b). Here the reasons given for denial of plaintiff's claim are not failure to prove the source of plaintiff's loss, but failure to prove ownership, rigging, and deployment of the gear and the extent of the loss.

Defendants' motion is denied. The matter is remanded for further proceedings consistent with this opinion.

So ordered.

Dated: Brooklyn, New York
October 13, 1988

s/ Eugene H. Nickerson, U.S.D.J.

# APPENDIX G

**Civil Action No. CV-88-1275, March 10,1992**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

JAMES E. FLAHERTY, 88-CV-1275

Plaintiff, MEMORANDUM AND ORDER

-against-

NATIONAL MARINE FISHERIES SERVICE, Financial Services Division, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, UNITED STATES DEPARTMENT OF COMMERCE, C WILLIAM VERITY, in his official capacity as Secretary of Commerce, WILLIAM EVANS in his official capacity as Assistant Administrator for Fisheries, JAMES E. DOUGLAS, Jr., in his official capacity as Acting Assistant Administrator for Fisheries, MICHAEL L. GRABLE, in his official capacity as Chief, Financial Services Division, National Marine Fisheries Service, CHARLES L. COOPER, in his official capacity as Program Leader, National Marine Fisheries Service,

Defendants.

----------x

JAMES E. FLAHERTY
Plaintiff pro se.

ANDREW J. MALONEY, United States Attorney
(Nancy A. Miller, of Counsel)
Brooklyn, New York.
Attorney for Defendant.

NICKERSON, District Judge:

Plaintiff brought this action against the National Marine Fisheries Service, ("Fisheries") challenging its denial of his application for compensation for lost fishing gear under the Fisherman's Protective At, 22 U.S.C. § 1980.By Memorandum and Order dated May 9, 1991 (the "1991 Order"), familiarity with which is assumed, the court remanded the case to National Marine Fisheries Service for further consideration.

Fisheries now moves for rearguement of that decision, and plaintiff cross-moves to reargue and renew its motion for summary judgment.

In the 1991 Order the court found that although the agency was justified in not compensating the plaintiff in full, kits decision to reject the claim in total was without basis. Plaintiff had presented credible and unchallenged evidence that he purchased and deployed at least some lobster traps. The court further noted that '[p]laintiff is also entitled to a presumption that a casualty did occur. See Fund Regulations at §258.34."

Fisheries requests that the court reconsider its order to the extent that it relied on §258.33 of

the applicable regulations, which can be found at 46 Fed. e.g. 58804 (1981). Under the heading "Rebuttable presumption of causation and proof of casualty" that regulation provides that an applicant seeking compensation for a fishing gear casualty must submit evidence that a casualty occurred, and then is entitled to a rebuttable presumption that unobserved casualties are attributable to another vessel, its crew or its gear.

A claimant who proves that a casualty occurred is entitled to a presumption that the casualty is attributable to another vessel, even if the claimant cannot come forth with evidence of the cause of the casualty. Section 285.34 does not

provide a similar presumption to claimants who cannot come forth with any evidence to support their claims. The citation of this regulation may have suggested such an interpretation. The court did not so intend.

The court based its decision on evidence in the record suggesting that a casualty did in fact occur. Plaintiff submitted to Fisheries affidavits from two individuals, Malandrucca and Staiger, who said they witnessed the casualty. Fisheries found the Malandrucca Affidavit unreliable because they could not locate him to confirm the statements and because it could not locate the notary whose stamp was affixed to the document. Fisheries rejected

Staiger's affidavit on the grounds that Staiger's interests were intertwined with those of the plaintiff.

In reviewing the agency's determination, this court did not determine that Fisheries must accept the evidence presented. It merely directed the Fisheries to either accept plaintiff's claim in part or explain why it rejects his claim to have suffered a casualty, regardless of its extent. Fisheries must reconsider the claim and either award plaintiff partial compensation, or explain why plaintiff is entitled to nothing.

After reconsidering this analysis the court sees no reason to modify it.

The court has also reviewed the parties other arguments carefully and sees no reason to depart from its earlier decision.

The motions for reargument are otherwise denied.

So Ordered.

Dated: Brooklyn, New York
March 10, 1992

s/ Eugene H. Nickerson U.S.D.J.

# APPENDIX H

## NMFS' Dec. 16, 1992, FINAL DETERMINATION

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1335 East-West Highway
Silver Spring Md., 20910

THE DIRECTOR

CERTIFIED MAIL- RETURN RECEIPT REQUESTED

IN REPY REFER TO
CASE NO. 87-029-VGD

Mr. James E. Flaherty
42 Neptune Avenue
Hampton Bays, New York, 11946

Dear Mr. Flaherty:

The court order of March 10,1992 directed that we either reconsider your clai,m against the Fishing Vessel and Gear Damage Compensation

Fund, and either award you partial compensation or explain why you are entitled to any compensation. Accordingly, our letter of August 24, 1992, informed you that we had reconsidered your claim and decided that you are not entitled to any compensation. Our letter provided the reasons for our decision. This constitutes our final determination for the purpose of review pursuant to 5 U.S.C. section 704. Any appeal must be promptly filed with the district court following reciept of this letter. Our reasons for this decision follow.

Your witness to the casualty do not convince us that a casualty actually occurred. Your alleged

two witnesses in the order in which you presented them to us, are Vincent R. Malandrucca and William Staiger.

Program regulations (50 CFR 258.33(i)(1) require each application to include ". . . . the name, address, and telephone number of each known witness to the casualty." The reason for requiring addresses and telephone numbers of witnesses is to enable us to verify their statements. Your claim application listed only yourself and Vincent Malandrucca as witnesses to your alleged casualty. When we were unsuccessful in our attempts to locate Mr. Malandrucca to verify his statement, we asked for your assistance in contacting him. You

told us that Mr. Malandrucca had moved from the area and left no forwarding address. Only then did you inform us that there was another witness to the alleged casualty, William Staiger, whom you suggested we contact to obtain his statement..

We obtained Mr. Staiger's statement supporting your description of the alleged casualty. Our subsequent investigation of your claim documentation revealed, however, that Mr. Staiger's various financial interests were so intertwined with yours that we had to consider him an interested party to your claim whose statement could not be relied upon to support the occurrence of the alleged casualty. As the Court found in its

decision May 9, 1991 , this agency "...was justified in disregarding the affidavit of Mr. Staiger whose interests were two intertwined with those of the plaintiff to allow him to be an objective witness."

Our initial and final determinations to deny your claim were based on our findings that (a) there was insufficient proof that you actually operated the 900 lobster traps which you claimed to have deployed prior to the alleged loss of 636 traps and (b) you failed to provide acceptable proof that the $31,305 allegedly required to rig 450 of these traps was actually spent or that the traps were actually rigged. A significant factor in our denial of your claim was our determination that

Mr. Staiger's witness statement and his receipt for rigging the 4560 traps appeared to be mere after-the-fact constructions to support your claim. At the time of the initial and final determinations denying your claim, we were convinced, and remain convinced that a casualty did not occur.

After our initial denial of your claim on October 23, 1987, Mr. Malandrucca reappeared in the form of newly signed copies of his original witness statement and a new statement. You provided us with another copy of the original statement signed by him again in 1987. This statement was supposedly notarized, but the notary failed to sign it. When we tried to contact her we

discovered that she had left her place of employment several years before and had left no forwarding address, and was not listed in the telephone directory.

As directed by the Court on February 1, 1989, we sent you our further articulation of the reasons for denial of your claim. On February 28, 1989, Mr. Malandrucca again resigned his original witness statement, and had it notarized, and you sent it to us. On June 5, 1991 we received a new notarized witness statement from Mr. Malandrucca. First, we tried to contact the notary indicated on the statement. That was impossible because he had died as a result of an automobile accident, in

January of 1992. Then we tried to contact Mr. Malandrucca at the only telephone number provided, his mother's to interview him about the questionable aspects of your claim. That proved impossible because the telephone number had been disconnected and the operator had no further information. Despite our extensive efforts, we have been unable to contact Mr. Malandrucca to verify his witness statements and interview about the questionable aspects of your claim. In summary, we are not persuaded that Mr. Malandrucca witnessed the alleged casualty, and we therefore cannot rely upon his statements which we are unable to verify.

In addition to your witness statements being unverifiable, the trip tickets which you submitted at our request do not support your contention that you suffered the loss of 636 of your 900 deployed lobster pots. The catch for the 3 trips prior to the alleged casualty (10/18/86, 11/26/86, and 11/30/86 averaged $3,245 in value. The catch during the trip of the claimed casualty is not consistent with the loss of 71% of your gear in the alleged casualty. Indeed it makes the occurrence of the alleged casualty questionable.

Another factor in our conclusion at the occurrence of your alleged casualty is questionable is your assertion in the claim application that the

F/V HEATHER LYNN was observed on radar towing through your gear in the night of December 16-17, 1986, and visually observed towing through your gear at 8:45 AM on December 17, 1986. Credible evidence in the form of a landing receipts from Point Judith, Rhode Island indicates that the HEATHER LYNN was not in the vicinity of the alleged casualty on the night during which you claimed to have observed that vessel towing through your gear. Further, Affidavits of the captain and crew of the F/V HEATHER LYNN indicate that when the passed your vessel on the morning of December 17, 1986, after returning to the area of your casualty, you made no effort to hail

or contact them in any way. It is incredible that you would not have attempted to contact a vessel which you observed towing through your gear and causing significant damage if, in fact, such damage actually occurred. The trip log of another fishing vessel, the F/V SPARTAN, indicates observing the HEATHER LYNN in the vicinity of gear belonging to you during the afternoon of December 16, 1986, however, there is no indication that any of your gear was damaged or that the HEATHER LYNN remained in the area of your gear during the following night, when your casualty allegedly began. In fact the F/V SPARTAN's observing the HEATHER LYNN on the afternoon of December 16,

1986, is consistent with the HEATHER LYNN's returning to Point Judith, Rhode Island to offload during the night of December 16-17, 1986.

In conclusion, based upon your application, attachments, and additional submissions, we do not find the evidence you submitted to be credible evidence that a casualty ocurred. We have reviewed your voluminous correspondence addressed to Ms. Barbara Ford and found no new factual evidence to be considered, but rather a repetition of arguments previously submitted and considered by the agency. As evidenced by the indictment against filed against you,of which you are aware, it is our finding that your claim is

without basis in fact. Consequently, we have determined that you are not entitled to compensation in any amount.

Sincerely,

s/ Nancy Foster for

William W. Fox Jr.

# APPENDIX I

**STATUTE----------28 U.S.C. §1735(b)**

**COURT RECORD LOST OR DESTROYED WHERE UNITED STATES INTERESTED**

Whenever the United States is interested in any lost or destroyed records or files of a court of the United States, the clerk of the court and the United States Attorney for the district shall take the steps necessary to restore such records or files under the direction of the judges of such court.

# APPENDIX J

10/23/93 Mot. to Compel Prod. of Court File

AUSA.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

JAMES E. FLAHERTY

*Plaintiff,*

*- against -*

NATIONAL MARINE FISHERIES SERVICE, FINANCIAL SERVICES DIVISION, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, UNITED STATES DEPARTMENT OF COMMERCE, C. WILLIAM VERITY, in his official capacity as Secretary of Commerce, or his Successor in office, WILLIAM EVANS, in his official capacity as Assistant Administrator for Fisheries, or his Successor in office, JAMES E. DOUGLAS, JR., in his official capacity as Acting Assistant Administrator for Fisheries, or his Successor in office, MICHAEL L. GRABLE, in his official capacity as Chief of Financial Services, National Marine Fisheries Service, or his Successor in office, CHARLES L. COOPER, in his official capacity as Program Leader, National Marine Fisheries Service, or his Successor in office, BARBARA FORD, in her official capacity as FSD-Financial Assistance Specialist,

*Defendants.*

---

PLAINTIFF'S AFFIDAVIT IN SUPPORT OF HIS APPLICATION FOR STAY OF DEFENDANT NMFS' PENDING MOTION FOR SUMMARY JUDGEMENT PENDING PRODUCTION BY GOVERNMENT OF DOCUMENTS UNDER TOTAL CONTROL OF THE GOVERNMENT CONSISTING OF:

(1) PLAINTIFF'S 1986 FEDERAL INCOME TAX RETURN,

(2) SWORN TESTIMONY OF MATERIAL WITNESS CAPT. BRUCE KOPF,

(3) PRODUCTION BY THE CLERK OF THE COURT OF THE ENTIRE ORIGINAL COURT FILE OF THIS ACTION (Pursuant to Rule 36(f) of the Federal Rules of Civil Procedure)

Hon. E. H. Nickerson
U.S.D.J. E.D.N.Y.

Civil Action No.
CV-88-1275

00019

# APPENDIX K

## 3/10/93 Fax from Pro-Se Clerk/ Files Lost

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK 11201

DATE: 3-10
TO FAX NO. (516) 727-4319 FROM FAX NO. 718-330-716
NAME OF SENDER: CECELIA VOLK
TELEPHONE NUMBER: (718) 330-2523
PLEASE DELIVER TO: MRS. JAMES FLAHERTY
TELEPHONE NUMBER:

NUMBER OF PAGES INCLUDING COVER SHEET: 1

MESSAGE: Please tell MR. FLAHERTY that there are only 3 files on the shelf here at the D.C. COURTHOUSE. I will also send him a letter to that effect. THANKS

NOTE: IF YOU DO NOT RECEIVE THE INDICATED NUMBER OF PAGES, PLEASE CALL THE SENDER

# APPENDIX L

## MARIANNE B. FLAHERTY COMPLAINT, Page 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

MARIANNE B. FLAHERTY,

Plaintiff,

-against-

ZACHARY CARTER, In his Official Capacity as UNITED STATES ATTORNEY, Eastern District of New York, ROBERT HEINEMANN In his Official Capacity as Clerk, United States District Court, Eastern District of New York,

Defendants.
----------x

COMPLAINT

Civil Action No. 98CV127

NICKERSON, J

COMPLAINT FOR DECLARITORY AND INJUNCTIVE RELIEF

1. This is an action for declaratory and injunctive relief, in the nature of mandamus, to compel the defendant ZACHARY CARTER, in his Official Capacity as United States Attorney, EDNY, and defendant, ROBERT HEINEMANN, in his Official Capacity as Clerk, Eastern District of New York, to perform their mandatory duty, to restore the lost files and records of Flaherty v. NMFS, CV-00-1275, as set forth in 28 USCS 1735(b), which says in pertinent part:

> "Whenever the United States is interested in any lost or destroyed records or files of a court of the United States, the clerk of such court, and the United States Attorney for the district shall take the steps necessary to restore such records or files, under the direction of the judges of such court."

## APPENDIX M

**MARIANNE B FLAHERTY Order to Show Cause**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

MARIANNE B. FLAHERTY,

Plaintiff,

- against -

ZACHARY CARTER, in his official capacity as UNITED STATES ATTORNEY, Eastern District of New York, ROBERT HEINEMANN in his official capacity as CLERK, United States Disrtrict Court, Eastern District of New York,

Defendants.

----------x

ORDER TO SHOW CAUSE

Civil Action No. _____

Nickerson, J

Upon the annexed affidavit of MARIANNE B. FLAHERTY, sworn to on March 23, 1994 and the

Exhibits attached thereto, and all of the prior proceedings and papers in the above captioned action, it is hereby:

ORDERED, that the above named defendants, by their attorneys, appear, and show cause,---at a term thereof to be held at the United States District Courthouse for the Eastern District of New York, situated at 225 Cadman Plaza, East, Brooklyn, New York, on the _____ day of _____ , 1994, at _____ O' Clock in the _____ noon of that day, ---- why an order should not be entered with the Clerk of this Court, pursuant to Rule 65 of the Federal Rules of Civil Procedure, granting a preliminary injunction which:

1. Directs the United States Attorney, EDNY, to disclose which copies of documents identified by number of the EDNY Court Docket Sheet of Flaherty v. NMFS, CV-88-1275, his office has in its possession.

2. Directs Defendant United States Attorney, EDNY, and Defendant CLERK of the Court, EDNY, to disclose what steps the defendants have taken, or intend to take,within the meaning of 28 U.S.C §1735(b), to restore the lost files of Flaherty v. NMFS, CV-88-1275.

3. Directs Defendant United States Attorney, EDNY, and Defendant CLERK of the Court, EDNY, within the meaning of 28 U.S.C §1735(b), to restore

the lost files of Flaherty v. NMFS, CV-88-1275, by a date certain to be set by Order of the Court,

4. and for such other and further relief as to this Court is just, proper, and equitable.

ORDERED, that personal service of a copy of this Order, and the papers upon which it was granted shall be deemed sufficient and timely, if made upon:

OFFICE OF THE UNITED STATES ATTORNEY
Civil Division, EDNY,
# 1 Pierrponte Plaza
Brooklyn, New York, 11201

CLERK's OFFICE, EDNY
United States District Court, EDNY
225 Cadman Plaza East,
Brooklyn, New York, 11201

on or before the _____ day of _____, 1994, at

_____ O' Clock of that day.

Dated: USDC, EDNY, Brooklyn, New York

May ____ , 1994, at ___ O'Clock of that day.

SO ORDERED,

Hon. _____
USDJ, EDNY

# APPENDIX N

## INDEX TO RECORD ON APPEAL, CV-88-1275

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

Flaherty

-v-

NMFS

----------X

DATE: 8/11/94

USDC DOC. # CV88-1275

RELATED DOC. #

JUDGE Nickerson

C of A # 94-6201

INDEX TO RECORD ON APPEAL

INDEX PREPARED BY: M.A. McGee

FIRM ADDRESS: EDNY

TELEPHONE NUMBER: (718) 330-2108

DOCKET ENTRIES 1 thru 174

| DOCUMENT NUMBER | LIST OF DOCUMENTS |
|---|---|
| | FOR INDEX - SEE ATTACHED |
| | ✓ - DOCUMENT SENT TO USCA |
| | * - DOCUMENT MISSING |
| | ** - Date Out Of Sequence |
| | |
| EXHIBIT A | Exhibit #5 - Videocassette |
| EXHIBIT B | Supporting Exhibits #2, A-Y, 7,9,11,12 |
| | |
| | |

| District | Off | Docket No. Yr. | Docket No. Number | OR | Filing Date Mo. | Filing Date Day | Filing Date Yr. | J | Nature Suit | B 23 | Judge | Mag. | Jury Dem. | Arb | MDL Docket | Docket Yr. | Docket Number |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 0207 | 1 | 88 | 01275 | 1 | 04 | 22 | 88 | 1 | 890 | | 0724 | | | N | | 88 | 01275 |

CAUSE: TITLE 5 SEC. 701 - OTHER STATUTORY ACTIONS

NICKERSON, J.

| PLAINTIFFS | DEFENDANTS |
|---|---|
| FLAHERTY, JAMES E. OTHER | -- NATIONAL MARINE FISHERIES SERV. FINANCIAL SERVICES DIVISION, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, UNITED STATES DEPARTMENT OF COMMERCE, C. WILLIAM VERITY, in his officail capacity as Secretary of Commerce, WILLAM EVANS, in his official capacity as Assistant Administrator for Fisheries, JAMES E. DOUGLAS, JR., in his official capacity as Acting Assistant Administrator for Fisheries, MICHAEL L. GRABLE, in his official capacity as Chief, Financial Services Division, NMFS & CHARLES L. COOPER, in his official capacity as Program Leader, NMFS. |

CLOSED

| ATTORNEYS | |
|---|---|
| JAMES E. FLAHERTY, PRO SE<br>P.O. Box 235<br>Hampton Bays, New York 11946<br>(516) 728-9212 | YVETTE RIVERA, AUSA<br>Nancy A. Miller, AUSA |

| CHECK HERE CASE WAS FILED IN DISTRICT AFFAIRS | FILING FEES PAID | | | STATISTICAL REPORTS PROCESSED |
|---|---|---|---|---|
| | DATE | RECEIPT NUMBER | C.D. NUMBER | Filing ____ ____ |
| | | | | Termination ____ ____ |
| | | | | Change ____ ____ |

TED STATES DISTRICT COURT DOCKET

DC-111 8/85

| DATE | NR. | FLAHERTY v. NATIONAL MARINE FISHERIES SERV. PROCEEDINGS | 88cv1275(TCP) |
|---|---|---|---|
| 1988 | | | |
| 4/22 | 1 | VERIFIED COMPLAINT for Declaratory & Injunctive Relief filed & summons issued. (entd4/26/88) bm | |
| 4/28 | 2 | Summons returned filed and executed as to all parties. (ent'd 5/2/88) | |
| 4/29 | -- | Before Nickerson, J., Case called. Plaintiff present. Counsel for defendant present. Motion argued. Decision reserved. sh | |
| 5/4 | 3 | By Nickerson, J., Order to Show Cause dtd 4/22/88 that on 4/29/88 at 9:30 a.m. why the preliminary and expediated relief sought in the complaint should not be granted, filed. (SEE ORDER FOR FURTHER DETAILS (ent'd 5/4/88) sh | |
| 5/9 | 4 | Letter to Nickerson, J., and Caden, M., from James E. Flaherty undated as a follow up letter to his letters dtd 5/4/88, filed. (SEE LETTER FOR FURTHER DETAILS) (ent'd 5/9/88) sh | |
| 5/9 | 5 | Letter to Nickerson, J., from Yvette Rivera dtd 4/28/88 setting reasons why defendants respectfully request that plaintiff is not entitled to any relief requested in the Order, filed. (ent'd 5/9/88) sh | |
| 5/9 | 6 | Letter to Nickerson, J., from James E. Flaherty dtd 4/29/88 writing this letter as a reply to Yvette Rivera's letter of 4/28/88, filed. (SEE LETTER FOR FURTHER DETAILS) (ent'd 5/9/88) sh | |
| /9 | 7 | Plaintiff's Amended Verified Complaint for Declaratory and Injunctive Relief, filed. (ent'd 5/11/88) sh | |
| 5/12 | 8 | Letter to Nickerson, J., from James E. Flaherty dtd 5/4/88 regarding Yvette Rivera's request to delay release of FOIA items, filed. (SEE LETTER FOR FURTHER DETAILS) (ent'd 5/12/88) sh | |
| 7/1 | 9 | BY Nickerson, J., Order dtd 6/28/88 that defendants request for an extension of time to respond to plaintiff's answer until 6/28/88 is granted, filed. (etn'd 7/1/88) sh (SO ORDERED ON LETTER TO JUDGE NICKERSON FROM YVETTE RIVERA DTD 6/27/88) | |
| 6/29 | 10 | Defendants' Notice of Motion made returnable 8/19/88 at 9:30 a.m. for an order dismissing the complaint, filed. (etn'd 7/1/88) sh | |
| 6/29 | 11 | Defendants' Memorandum of Law in Support of Defendants' Motin to dismi the amended complaint , filed. (ent'd 7/1/88) sh | |
| 8/24 | 12 | By Nickerson, J. , Standard Referral Order dtd 8/24/88 that this case is referred to Magistrate Caden for Pre-Trial purposes, filed. (ent'd 8/24/88) sh | |
| 8/24 | 13 | Memorandum of Law in Support of Defendants' Motion to Dismiss the Amended Complaint, filed. (CORRECTED COPY) (ent'd 8/26/88) sh | |
| 8/30 | 14 | Affidavit of James B. Flaherty in Opposition to the motion by the defendants, filed. (ent'd 8/31/88) sh | |
| 8/30 | 15 | Memorandum of Law in Opposition to defendant's motion to dismiss the Amended Complaint pursuant to Rule 12(b)(1) Federal Rules Civil Procedure, filed. (ent'd 8/31/88) sh | |
| )/2 | -- | Before Nickerson, J., Case called on 9/2/88 at 9:45 a.m. for motion for dismissal. Plaintiff present Pro Se. Counsel for defendant present. Motion argued. Decision reserved. sh | |
| 9/7 | 16 | Letter to Judge Nickerson from Yvette Rivera dtd 9/1/88 responding to plainitff's oppoition to defendants' motion to dismiss this action, filed. (SEE LETTER FOR FURTHER DETAILS) (ent'd 9/7/88) sh | |
| 0/20 | 17 | By Judge Nickerson Memorandum and Order dtd 10/13/88 that defendants' motion is denied and the matter is remanded for further proceedings in accordance with this opinion, filed. (ent'd 10/20/88) ss C/M | |

(EHN)

CIVIL DOCKET CONTINUATION SHEET

| PLAINTIFF | DEFENDANT | DOCKET NO 88cv1275 |
|---|---|---|
| FLAHERTY, JAMES E. | NATIONAL MARINE FISHERIES SERV et al | PAGE 2 OF 2 PAGES |

| DATE | NR. | PROCEEDINGS |
|---|---|---|
| 1988 | | |
| 12/12 | 18 | Ltr to J. NICKERSON from the pltff dtd 12/12/88. Would be grateful for any assistance that it may render to expedite both the final disposition of this matter, as will as the matter now before Fisheries. (entd 12/14/88) bs |
| 12-14 | 19 | Pltffs NOTICE OF MOTION returnable 12-30-88 at 9:30 A.M. , for an Order seeking compliance on or before a date certain, to be set by the Court. (ent.12-19-88) LCJ |
| 12-19 | 20 | Pltffs MEMORANDUM OF LAW. (ent.12-19-88) LCJ |
| 1989 | | |
| 1-11 | 21 | Pltffs NOTICE OF MOTION returnable 1-27-89. Pursuant to Rule (b), for an"interim" judgment for Costs & Disbursements. (ent.1-17-89) LCJ |
| 1-13 | 22 | Pltffs MEMORANDUM OF LAW In Support of pltffs Motion for costs. (ent.1-17-89) LCJ |
| 1-23 | 23 | By Nickerson,J. ORDER TO SHOW CAUSE dated 1-23-89. The defendants are to show cause on 1-25-89 at 2:00 P.M. in the E.D. Courthouse, why plaintiff's Motion for compliance should not be restored to the Motion Calender, returnable 1-27-89 at 9:30 A.M. (attached exhibits) (ent.1-24-89) LCJ |
| /25 | -- | Before Judge Nickerson on 1/25/89 Case called for Order to Show Cause for compliance. Plaintiff Pro Se Present. Counsel for defendant present. Motion argued. Motion denied. ss |
| 2/2 | 24 | Letter to Judge Nickerson from Yvette Rivera dtd 1/25/89 requesting that defendant be given until 2/2/89 to submit its letter to plaintiff pursuant to Your Honor's order dtd 10/13/88, filed. (ent'd 2/2/89) ss |
| 2-3 | 25 | Pltffs AMENDED NOTICE OF DEPOSITION to be taken on the following parties: James W. Brennan, Michael Grable, Charles L. Cooper on 2-14-89 in the offices of Mancuso Reporting Services at 1155 21st. St. NW Lafayette Center, 3, Suite 400, Washington, D.C. all at 11:00 A.M. (ent.2-8-89) LCJ |
| 2-7 | 26 | Letter to Nickerson,J. from James Flaherty dated 2-7-89. Re: Mileage and attendance fees. (ent.2-9-89) LCJ |
| 4/25 | 27 | Pltff's ADMINISTRATIVE RECORD (copies of various form,letters,etc.) (Copy) (ent.4/27/89) LCJ |
| 5/3 | 28 | Letter to Nickerson,J. from Yvette Rivera dated 4/25/89. Requesting the Court enter a scheduling order concerning motion practice in this case. (ent.5/3/89) LCJ |
| 12/18 | 29 | COPY of letter to Nan Miller,AUSA from James Flaherty dated 12/15/89. Confirming the conference scheduled for 12/19/89 at3:30 P.M. (ent.12/20/89) LCJ |
| 1990 | | |
| 1/24 | 30 | Letter (by hand) to William Young,SAUSA from James Flaherty dated 1/21/90. Requesting extension of 17 days until 2/10/90 to respond to letter dated 1/3/90. (ent.1/24/90) LCJ |

PLAINTIFF | DEFENDANT | DOCKET NO ____ | PAGE ___ OF ___ PAGES

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 1990 | | |
| 2/28 | 31 | LETTER to Wm. Young, Nan Miller & Wm. Fox from James Flaherty date 2/26/90. Re: Preliminary response to letters dated 2/20/90,2/10/9 (attached exhibits) (for more info see file)(ent.3/7/90) LCJ |
| 3/1 | 32 | COPY of letter to James Flaherty from Nancy A. Miller AUSA dated 2/22/90. Advising Mr. Flaherty that a disposition motion will be submitted. (ent.3/7/90) LCJ |
| 3/5 | 33 | LETTER to Nan Miller & William Fox from James Flaherty dated 3/1/ 90. Re: Preliminary response to letter dated 2/22/90.(ent.3/7/90)LC |
| 3/7 | 34 | LETTER to Nan Miller, William Young & Wm. Fox from James Flaherty dated 2/10/90. Re: Pending related issues. (for more info see file) (ent.3/7/90) LCJ |
| 3/7 | 35 | Pltff's NOTICE OF MOTION returnable 3/23/90 at 9:30 A.M.for an Order directing consolidation of the following actions:88-CV-127 88-CV-3275. (ent.3/7/90) LCJ (attached exhibit) |
| 3/28 | 36 | LETTER to Nickerson,J. from Nancy A. Miller AUSA, dated 3/19/90. Requesting oral argument concerning plaintiff's motion for consolidation be adjourned from 3/23/90 until 5/4/90 at 9:30 A.M. (ent.3/28/90) LCJ |
| 3/28 | -- | By Nickerson,J. Granted and So Ordered dated 3/20/90. (see #36 on letter above) (ent.3/28/90) LCJ |
| 4/17 | 37 | Pltffs NOTICE OF MOTION returnable 5/4/90 at 9:30 A.M. for an Order pursuant to §§701-706 to include all documents consisting of N.M.F.S. records. (ent.4/19/90) LCJ |
| 4/17 | 38 | Pltffs MEMORANDUM OF LAW In Support of plaintiff motion to expand the Administrative Record of Flaherty v. N.M.F.S. (ent.4/19/90) LCJ |
| 5/7 | 39 | Pltffs NOTICE OF MOTION returnable 5/25/90 at 9:30 A.M. for leave to serve an Amended Complaint or Supplemental Complaint. (attached exhibits) (ent.5/10/90) LCJ |
| 5/7 | 40 | Pltffs MEMORANDUM OF LAW in support of motion for leave to serve Supplemental Complaint. (ent.5/10/90) LCJ (attached exhibits |
| 5/17 | 41 | Letter to Law Clerk Kit from James Flaherty dated 5/16/90. Re: Pre-motion Conference for 5/25/90. (ent.5/21/90) LCJ |
| 7/19 | 42 | Deft's NOTICE OF MOTION for summary judgment returnable 8/10/90 at 9:30 A.M. (ent.7/19/90) LCJ |
| 8/7 | 43 | LETTER to Judge Nickerson from Nancy A. Miller dated 7/31/90. Requesting the return date for United States' motion for summary judgment be adjourned from 8/10/90 to 8/17/90.(ent.8/7/90) LCJ |
| 8/7 | --- | By Nickerson,J. Granted, So Ordered dated 8/1/90. (see #43 above on letter) (ent.8/7/90) LCJ |
| 8/7 | 44 | Deft's SUPPLEMENTAL ADMINISTRATIVE RECORD. (ent.8/13/90) LCJ |
| 8/8 | 45 | Deft's RULE 3(g) STATEMENT. (ent.8/13/90) LCJ |
| 8/8 | 46 | Deft's MEMORANDUM OF LAW in support of motion for summary judgment. (ent.8/13/90) LCJ |
| 9/11 | 47 | LETTER (by hand) to Nickerson,J. from James Flaherty dated 9/9/90 Requesting extension of time to answer the government's pending Motion for Summary Judgment. (ent.9/12/90) LCJ |

(CONT'D)

CIVIL DOCKET CONTINUATION SHEET

| PLAINTIFF | DEFENDANT | DOCKET NO. 88-1275(EH |
|---|---|---|
| JAMES E. FLAHERTY | NATIONAL MARINE FISHERIES, SERVICES, ET AL. | PAGE 3 OF ___ PAGES |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 1990 12/14 | 48 | Before Caden, M. Case called. Conference held. Next conference scheduled for 1/25/91 at 10:00 a.m. Magistrate has resolved all outstanding discovery disputes; in addition, the Magistrate has directed that the parties provide him with all motion papers involved on the motion(s) returnable before Judge Nickerson on 2/1/91. The Magistrate will forward the papers to the Judge's chambers after the conference. (Ent'd 12/18/90) fc |
| 1991 1/10 | 49 | Letter filed dtd. 12/27/90 from Richard Goldstein, AUSA to Mag. Caden, in re: we submit that pltff's proposed order should not be signed because it fails to accurately reflect what transpired at the 12/14 conference and is unnecessary in view of the defts' agreement to produce these documents voluntarily. (Ent'd 1/10/91) fc |
| 1/10 | 50 | Letter filed dtd. 1/2/91 from pltff to Judges Nickerson & Mag. Caden, in response to letter dtd. 12/27/90 from Richard Goldstein, AUSA. (Ent'd 1/10/91) fc |
| 1/10 | 51 | Letter filed dtd. 1/3/91 from Richard Goldstein, AUSA to pltff., in re: copy of letter dtd. 6/1/87, although we contend this letter was not part of what the defts agreed at the 12/14/90 to turn over to you, we have no objection to production. Delivery of this document no satisfies all discovery demands in conjucntion with pending motions. (Ent'd 1/10/91) fc |
| 1/25 | 52 | LETTER to Nan Miller, AUSA from James Flaherty re: plaintiff's answering papers to defendants motion for summary judgment. (attached video cassette and Memorandum of Law) (ent.1/25/91) LCJ |
| 1/25 | 53 | Pltffs EXHIBIT #4. (ent.1/25/91) LCJ |
| 1/25 | 54 | Pltffs REPLY & NOTICE OF CROSS-MOTION For Judgment on the pleadings or alternatively Summary Judgment. (ent.1/25/91) LCJ (attached exhibits) |
| 1/30 | 55 | Defts REPLY Memorandum Of Law in further support of their motion for summary judgment. (ent.2/5/91) LCJ |
| 1/31 | 56 | Defts AMENDED Reply Memorandum Of Law in further support of their Motion for summary judgment. (ent.2/5/91) LCJ |
| 2/1 | 57 | Before Nickerson, J. Case called. Pltff present pro se. Atty. for deft present. Motion hearing held on pltff & deft's motions for summary judgment as well as pltff's motion for remand. Decision reserved. (Ent'd 2/13/91) fc |
| 4/30 | --- | LTR. to Judge Nickerson from James Flaherty dated 4/27/91 requesting that the case before Judge Mishler be transferred to Judge Nickerson as a related case. (see dkt. 88-CV-3275 item #63) (ent.5/1/91) LCJ |
| 5/14 | 58 | By Judge Nickerson MEMO/ORDER dated 5/9/91 the U.S. motion for summary judgment is denied. Plaintiff's cross-motions are also denied. The case is remanded to the National Marine Fisheries Service for further proceedings not inconsistent with this Memorandum & Order. (for more info see file) c/m (ent.5/14/91) LCJ |
| 5/22 | 59 | JUDGMENT by Jim Giokas dated 5/15/91 filed. It is ajudged that the United State's motion for summary judgment is DENIED; that Plaintiff's cross-motions are DENIED; and that the case is REMANDED to the National Marine Fisheries Service for further proceedings. filed. ~~Copies mailed with appeals packs. sg~~ |

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| 1991 | | |
| 5/29 | 60 | Deft's NOTICE OF MOTION returnable 6/14/91 at 9:30 A.M. for an Order vacating the Court's denial of summary judgment. (ent.5/31/91) LCJ |
| 5/29 | 61 | Deft's MEMORANDUM OF LAW in support OF Motion for reargument vacating the denial of summary judgment. (ent.5/31/91) LCJ |
| 6/11 | 62 | LTR. to Judge Nickerson from James Flaherty dated 6/10/91 requesti: an enlargement of time to reply to defendants' motion to re-argue. (ent.6/12/91) LCJ |
| 6/11 | 63 | LTR. to Judge Nickerson from James Flaherty dated 6/9/91 re: plaintiff's intention to submit to NMFS additional factual data, etc. (attached various letters and papers to William Fox, Affidavi: of Vincent R. Malandrucca, etc.) (ent.6/12/91) LCJ |
| 7/10 | 64 | LTR. to Nancy Miller, AUSA from James Flaherty dated 6/7/91 requesting a further "Enlargement Of Time" to respond to the Govt's pending Motion to re-argue. (ent.7/11/91) LCJ |
| 8/6 | 65 | (Copy) of letter to Nancy Miller AUSA, dated 8/2/91 from James E. Flaherty requesting an enlargement of time of (3) business days to complete responsive papers. (ent.8/7/91) LCJ |
| 8/9 | 66 | Pltff's NOTICE OF CROSS-MOTION for leave to re-argue returnable 8/23/91 at 9:30 A.M. (ent.8/14/91) LCJ |
| 8/9 | 67 | Pltff's NOTICE OF CROSS-MOTION for leave to re-new returnable 8/23/91 at 9:30 A.M. (ent.8/14/91) LCJ |
| 8/9 | 68 | AFFIDAVIT of James Flaherty in opposition to defendant's Motion for leave to re-argue. (ent.8/14/91) LCJ |
| 8/14 | 69 | Pltffs MEMORANDUM OF LAW in opposition to defendants motion for re-argument & in support of plaintiff's cross-motions for leave of the court to re-argue and for leave of the court to re-new. (ent.8/15/91) LCJ |
| 10/8 | 70 | Order by Judge Nickerson, 9/9/91, Response to Mr. Flaherty's most recent voluminous submissions to the court due on or before 9/30/91 (EOD 10/8/91 |
| 10/8 | 71 | Order by Judge Nickerson, 10/2/91, Response to pltff's opposition and motions extended to 10/7/91. (EOD 10/8/91 |
| 10/11 | 72 | LTR. to Nancy Miller, AUSA from James Flaherty dated 10/10/91 re: enlargement of time for government to file answering papers to pltf: cross-motion. (ent.10/16/91) LCJ |
| 10/15 | 73 | LTR. to Nancy Miller, AUSA from James Flaherty dated 10/15/91 requesting a further enlargement of time to serve supplemental cross-motion to renes. (ent.10/16/91) LCJ |
| 10/21 | 74 | Pltffs Request for Oral Argument, or alternatively, pre-motion conference, tenatively returnable on 11/22/91. (ent.10/23/91) LCJ (attached Affidavit in support) LCJ |
| 11/6 | 75 | LTR. to EHN from James Flaherty dated 10/22/91 re: paragraph 5 o page 3 of plaintiff's Affidavit 10/21/91, the date 8/17/91 should be corrected to 10/17/91. (ent.11/6/91) LCJ |

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| DATE | NR | PROCEEDINGS |
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| 1991 | | |
| 11/15 | 76 & 77 | LTR. To Nancy Miller, AUSA from James Flaherty dated 11/14/91 Re: Defendant's request for enlargement of time to serve and file responsive papers. (ent. 11/19/91) LCJ |
| 11/15 | 78 & 79 | LTR. to W. Walsh from James Flaherty dated 11/14/91 requesting he be notified as to which date Nancy Miller feels is acceptable to her for re-argument. (ent.11/19/91) LCJ |
| 12/4 | 80 | Letter dated 11/20/91 from James Flaherty to Mr. Walsh advising that he did not consent to the return date of motion from 11/22/91 to 12/13/91: & requesting that Court strike the return date of 12/13/91. & set a different date acceptable to both the pltff & deft. (ent'd. 12/4/91). eg |
| 11/27** | 81 & 82 | Pltffs Supplemental Affidavit in support of cross-motion for re-arguement & Pltffs Supplemental Memorandum Of Law in support of cross-motion for rearguement. (ent.12/5/91) LCJ |
| 12/5 | 83 | LETTER to EHN from Nancy Miller dated 11/15/91 requesting the pending motion returnable 11/22/91 be adjourned to 12/13/91 on consent. (ent.12/5/91) LCJ |
| 12/5 | 84 | NOTICE to all parties by S. Wilson dated 11/19/91 conference to be held on 12/4/91 at 11:15 A.M.,Courtroom 11. c/m (ent.12/5/91) LCJ |
| 12/16 | 85 | LTR. to Nancy Miller from James Flaherty dated 12/16/91 re: failure of plaintiff to receive Government's responsive motion papers one week prior to return date of pending motion. (ent.12/18/91) LCJ |
| 12/20 | 86 | Deft's MEMORANDUM OF LAW in reply to plaintiff's opposition to defendant NMFS et al Motion for reargument and in opposition to plaintiff's cross-motions to rearque and renew. (ent.12/23/91) LCJ |
| 12/4** | 87 | Before EHN case called, pro se plaintiff not present. Motion to be made by plaintiff returnable 12/20/91. (ent.1/2/92) LCJ |
| 12/26 | 88 | Pltffs REPLY AFFIDAVIT in support of Motions to re-arque & re-new & for modification of May 9, 1991 Order to facilitate full remand of plaintiff's claim for loart fishing gear to defendant agency for further consideration of full amount of loss. (ent.1/2/92) LCJ |
| 1992 | | |
| 1/2 | 89 | LTR. to EHN from Nancy A. Miller dated 12/20/91 requesting the oral argument on plaintiff's motion be adjourned to 1/3/92. (plaintiff does not consent) (ent.1/2/92) LCJ |
| 1/6 | 90 | LTR.to EHN from Jmaes Flaherty dated 1/3/92 requesting extension of time, until 1/15/92, to serve and file plaintiff's reply memorandum of law. (ent.1/8/92) LCJ |
| 1/6 | -- | By EHN SO ORDERED & Granted dated 1/8/92. (see #90 above on letter) (ent.1/15/92) LCJ |

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| DATE | NR. | PROCEEDINGS |
|---|---|---|
| 1992 | | |
| 1/16 | 91 | LTR. to EHN from James Flaherty dated 1/15/92 requesting addition time to serve and file plaintiff's reply memorandum of law due to equipment failure. (ent.1/17/92) LCJ |
| 1/16 | --- | By EHN dated 1/21/92 So Ordered and Granted. (see #91 above on ltr (ent.1/31/92) LCJ |
| 2/12 | 92 | Pltffs SUPP. REPLY MEMORANDUM OF LAW. (ent.2/19/92) LCJ (attached ltr. to EHN from James Flaherty dated 2/7/92 re: extreme health problems in the family) (ent.2/19/92) LCJ |
| 3/26 | 93 | By EHN MEMO/ORDER dated 3/10/92 the Motions for reargument are----- DENIED. (Cert'd) c/m (ent.3/26/92) LCJ |
| 5/21 | 94 | (COPY) of letter to Michael Grable from James Flaherty dated 5/5/92 requesting an enlargement of time to submit additional documents. (ent.5/21/92) LCJ |
| 8/10 | 95 | (COPY) of letter to Barbara Ford from James Flaherty dated 7/5/92 re: Fishing vessel & gear damage compensation. (ent.8/11/92) LCJ |
| 9/16 | 96 | LETTER to EHN from James Flaherty dated 9/9/92 re: Administrative review of claim pursuant to Court's 3/10/92 Order. (ent.9/30/92) LC |
| 10/1 | 97 | LTR. to Pro Se Clerk C.Volk from James Flaherty dated 9/28/92 enclosing letter to Barbara Ford dated 9/28/92 re: fishing vessel and gear damage compensation fund claim #87-029-UGD. (ent.10/2/92) L |
| 10/26 | 98 | (COPY) of letter to Barbara Ford from James Flaherty dated 10/11/92 re: haven't received answers to letter dated 7/5/92, 8/31/92, 9/9/9 & 9/28/92. (ent.10/29/92) LCJ |
| 10/26 | 99 | (COPY) of letter to Barbara Ford from James Flaherty dated 10/21/92 re: still awaiting reply to his letter dated 7/5/92. (ent.10/29/92) |
| 10/30 | 100 | LETTER (by hand) to Judge Nickerson from James Flaherty dated 10/29/92 Enclosing plaintiffs : (1) Notice of Motion for leave to serve and file a Supplemental Complaint, returnable 11/13/92, (2) Affidavit w annexed Exhibits, in support of Notice Of Motion (3) Supplementary Master's-Owner's Affidavit in support of Notice Of Motion, (4) Proposed Supplemental Complaint (Exhibit C of plaintiff's Affidavit),(all exhibits attached) (ent.10/30/92) LCJ |
| 11/2 | 101 | Pltffs Notice Of Motion for leave to file a Supplemental Complaint returnable 11/13/92. (ent.11/3/92) LCJ |
| 11/19 | 102 | LTR. to EHN from James Flaherty dated 11/17/92 respectfully objecting to defendant's request for further adjournment of plaintiff pending motion. (ent.12/9/92) LCJ |
| 12/9 | 103 | LTR. to EHN from Nancy A. Miller dated 11/24/92 requesting the return date of plaintiff's pending motion be adjourned from 11/27/92 to 12/18/92. (ent.12/9/92) LCJ |
| 12/9 | 104 | By EHN MEMO/ORDER dated 11/27/92 the Court shall hear oral argument on plaintiff's pending motion on 12/18/92. Defendants shall send opposition papers on 12/7/92. pltffs reply by 12/16/92. (ent. 12/9/92) LCJ |

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| 1992 | | |
| 12/8 | 105 | DECLARATION of service as to Memorandum of law in support of plaintiff's motion for leave to serve a supplemental complaint served upon defendants on 12/8/92. (ent.12/11/92) LCJ |
| 2/16 | 105 & 106 | Pltffs MEMORANDUM OF LAW in support of Motion for leave to file a Supplementary Complaint (Volumes 1 & 2) (ent.12/17/92) LCJ |
| 2/17 | 107 | Pltffs' "Table Of Cases Part II". (ent.12/18/92) LCJ |
| 2/16** | 108 | (Fax copy) of letter to James Flaherty from William W. Fox dated 6/22/92 we have considered your claim and decided that you are not entitled to any compensation. (ent.12/23/92) LCJ |
| 2/18 | 109 | Before EHN motion to supplement complaint hearing held. Motion argued. Decision reserved. (ent.12/23/92) LCJ |
| 12/7** | 110 | Defts MEMORANDUM OF LAW in opposition to plaintiff's motion for leave to serve a supplemental complaint pursuant to Rule 15(d). (ent.1/6/93) LCJ |
| 1993 | | |
| 1/6 | 111 | LTR. to EHN from James Flaherty dated 12/20/92 re: typographical errors in plaintiff's 12/16/92 memorandum of law. (ent.1/6/93) LCJ |
| 1/25 | 112 | AFFIDAVIT of Gregory J. Blass,Atty., submits this affidavit in the interest of justice. (ent.2/4/93) LCJ |
| 1/25 | 113 | LTR. to EHN from James Flaherty dated 1/20/93 re: substantial conflict between the statements of Ms. Foster in her 12/16/92 written communication. (ent.2/4/93) LCJ |
| 2/4 | 114 | By EHN MEMO/ORDER dated 1/20/93 plaintiff's Motion for leave to file a supplemental complaint is----Granted. c/m (ent.2/4/93)LCJ |
| 3/23 | 115 | TAPE (un-dated) (ent.3/23/93) LCJ |
| /19** | 116 | LTR. (by hand) to Nan Miller from James Flaherty dated 2/12/93 re: Service of supplementary complaint. (ent.3/23/93) LCJ |
| /19 | 117 | LTR. to Wm. Young by James Flaherty dated 3/5/93 re: awaiting notification from LISB. (ent.3/23/93) LCJ |
| 3/19 | 118 | LTR. to William Young from James Flaherty dated 3/15/93 re: have not received confirmation from Long Island Savings Bank as to the check from Allstate arriving there. (ent.3/23/93) LCJ |
| 3/19 | 119 | LTR. to Ms. Foster from James Flaherty dated 1/22/93 re: letter dated 12/16/92 (attached copies of various items) (ent.3/23/93) LCJ |
| 3/19 | 120 | Pltffs SUPPLEMENTAL COMPLAINT (attached exhibits) (ent.3/23/93) LCJ |
| 25 | 121 | Affidavit of mailing of the Memoradum and Order dated 1/28/93 and the Supplemental Complaint upon the Dept. of Justice; National Marine Fisheries Service and the Dept of Commerce, on 3/15/93. dmc |
| 4/7 | 122 | By EHN ORDER dated 3/30/93. The parties James Flaherty, Nancy A Miller and William Young to appear on 4/16/93 at 10:00 A.M. for a conference, to review the pending motions. (ent.4/7/93) LCJ |

(see ICMS docket 88-CV-2100 & 88-CV-3275)

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| 4/16 | 123 | Before EHN, ESR M.Daniele, case called. Counsel for defendant present, plaintiff appears pro se. Status conference held. (ent.4/29/93) LCJ |
| 4/23 | 124 | Before Mag, Caden, Tape # 93/25 1-3257. The government will file and docket the administrative record to be provided by the Court for its review; copies will be provided to plaintiff no later than (3) weeks from today; Thereafter, plaintiff will be given (3) wee to provide government counsel with his proposed administrative record; before this record is ultimately forwarded to Judge Nickerson parties will meet with Mag, Caden on 6/25/93. (ent.4/29/93) LCJ |
| 4/29 | 125 | (COPY) of letter to Nancy Miller from James Flaherty dated 4/19/93 Confirming the conference scheduled for 4/23/93 before Mag, Caden (ent.4/29/93) LCJ |
| 4/23** | --- | Deft's NOTICE OF MOTIONrelevant to scheduling returnable 5/7/93 at 10:00 A.M. (see docket 88-CV-3275 item #81)(ent.4/29/93) LCJ |
| 5/7 | 126 | By EHN ORDER dated 5/5/93 the schedule of motions agreed upon on 4/16/93 is vacated, AUSA William Young is directed to attend the conference with Mag, Caden on 6/25/93 at 12:00 Noon so that the Magistrate, Mr. Flaherty, Mr. Young & Ms. Miller may agree upon a schedule for all motions in these cases. (for more info see file) (ent.5/7/93) LCJ |
| 6/25 | 127 | Before Mag, Caden, next conference on 7/9/93 at 10:00 A.M., parti will meet with the Magistrate Judge for purposes of (1) agreeing o the contents of the administrative.(2) A possible stipulation on plaintiff's supplemental complaint and (3) other matters. (ent.7/6 93) LCJ |
| 7/9 | 128 | Before Mag, Caden. Plaintiff and the defendant Fisheries have agreed on the administrative record for purposes of certain dispositive motions to be filed with the following exceptions: (1) Supplementary vessel Master's Affirmation, (2) a calned marigation chart, (3) documents referred to as EXAA,BB, & CC, (4) letter dated October,15,1991 from defendant Fisheries to Mr. Calvin, (5) claim 87-016-v9D dated March 1987, (6) Blass Affidavit, (7) Sched I for claim 87-029-V9D. These documents with the Magistrate's permission will be used by Mr. Flaherty in his motion papers dispite the parties disagreement over their being part of an Administrativ record in this case. In addition, plaintiff will be permitted to file with the Magistrate's permission, a second supplemental complaint in 88-CV-1275. Plaintiff has served two requests today upon Fisheries in 88-CV-1275 under Rule 36 which the Magistrate Judge has vacated as unnecessary for purposes of resolving the disposit motions. In 88-CV-3275, plaintiff has withdrawn his motion relev ant to scheduling dated 4/24/93. Motions in both 88-CV-1275 & 88-3275 have been scheduled-See AUSA Miller's letter dated 6/28/93(at ched) (ent.7/13/93) LCJ |

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| 7/9 | 129 | Pltffs First Request for Admissions of Fact & Genuineness of Documents. (ent.7/13/93) LCJ |
| 7/9 | 130 | Pltffs Second Supplemental Complaint. (ent.7/13/93) LCJ |
| 7/9 | 131 | Pltffs Second Request for Admissions of Fact & Genuineness of Documents. (ent.7/13/93) LCJ |
| 8/17 | 132 | Before Mag, Caden, Tape # 93/46 4320-end & 93/47 1-1088. Magistrate has revised the motion schedule as follows: defendant's dispositive motion due 8/27/93, pltffs opposing motion papers due 9/24/93, Govt's/deft reply 10/1/93 . (ent.8/20/93) LCJ |
| /3 | 133 | Letter dated 9/3/93 from AUSA Nancy A. Miller to Judge Caden requesting that deft National Marine Fisheries' time to file its motion for summary judgment be extended from 8/27/93 to 9/3/93; & that pltff's time to file opposition papers be extended from 9/24/93 to 10/1/93. (ent'd 9/7/93).**Application Approved 9/8/9 |
| /3 | 134 | National Marine Fisheries' motion for summary judgment returnable 10/29/93 at 9:30AM. (ent'd 9/7/93). eg |
| /3 | 135 | National Marine Fisheries' Rule 3(g) Statement. (ent'd. 9/7/93). eg |
| /3 | 136 | Defts' Memo of law in support of motion for summary judgment. (ent'd. 9/7/93). eg |
| /3 | 137 | 2nd Supplemental Administrative Record. filed. (ent'd 9/7/93). --eg |
| 9/9 | | By Mag, Caden dated 9/8/93 (copy/Original) Application Aoproved, all parties will be advised (see item #133) (ent.9/10/93) LCJ |
| 0/25 | 138 | Plaintiff's application for stay of deft NMFS' pending motion for summary judgement pending production by govt of documents under total control of the govt consisting of: 1) plaintiff's 1986 Federal income tax return,2) sworn testimony of material witness Capt. Bruce Kopf. 3) Production by the clerk of the entire original court file of this action. (ent. 10/25/93) dd |
| 0/25 | 139 | Plaintiff's Affidavit in support of his application for stay of deft NMFS' pending motion for summary judgement etc.. (ent.10/25/93) dd |
| 0/25 | 140 | Affidavit of Material Witness Bruce Kopf. Master of the F/V Spartan (ent. 10/25/93) dd |
| 0/25 | 141 | Plaintiff's memo of law in support of his application for stay of deft NMFS' pending motion for summary judgement etc..(ent 10/25/93)dd |
| 0/27 | 142 | Letter dated 10/19/93 from AUSA Nancy Miller to James Flaherty, re: proposed amended scheduling to be submitted to the Court. (ent. 10/27/93) dd |

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| 1993 | | |
| 1/5 | 143 | Pltffs Supplementary Affidavit in opposition to defendant's motion for summary judgment. (ent.1/6/94) (Attached Exhibits A-D) LCJ |
| 1/5 | 144 | Before Mag, Caden, all motions in 88-CV-1275 & 88-CV-3275 are returnable before EHN on 4/29/94 at 10:00 A.M.; pltffs request for additional discovery is-----Denied; plaintiff may submit 1986 tax returns in motion papers but nothing from pty Kopf will be submitted; motion schedule has been set. (ent.1/6/94) LCJ |
| 1/11 | 145 | (COPY) of letter to James Flaherty from Nancy A. Miller,AUSA dated 1/6/94. The dates agreed upon for submission of papers are as follows: Case 88-CV-1275 opposition to summary judgment due 2/28/9. NMFS reply due 3/14/94, case 88-CV-3275 opposition to SBA motion to dismiss counterclaim due 3/14/94, SBA reply due 3/28/94. Return date for all motions 4/29/94 at 10:00 A.M. (ent.1/19/94) LCJ |
| 3/9/ | 146 | LTR. to C. Volk from James Flaherty dated 3/2/94. Requesting to inspect and copy all documents that were filed in this case. (ent. 3/11/94) LCJ |
| 3/28 | -- | Plaintiff's Affidavit Requesting an englargment of time to complete motion for summary judgment. This is doc # 87 on CV 88-3275 (ent 3/29/94) VV |
| 28/ | -- | Letter from Mr. Flaerty to AUSA Nancy Miller and William Young dtd. 3/26/94 Subject: Englargement of Time, to make emergency repairs, and pending availability of entire Court file for examination and copying by Plaintiff. (ent 3/29/94) VV |
| 4/1 | 147 | Lttr. dtd. 3/25/94 from AUSA, Nancy Miller. to Mag. Caden. requesti a status Conf. since the plaintiff is unable to comply with the Court's amended scheduling order dtd. 1/6/94 eod 4/4/94 vba |
| 4/13 | -- | Calendar entry before Magistrate Caden on 4/13/94 at 12:00. Pltff Flaherty has filed an affidavit dated 3/22/94 giving eight reasons more or less for not complying with the Court's order requiring pltff Flaherty to file responsive motions in both cases noted abov (this and related case 88-CV-3275). These reasons are, after hearing before the Magistrate Judge, wholly unacceptable given the fact th the most recent scheduling order (1/5/94) has been one of a series of such schedules put out since the summer of 1993. In addition, a today's conference, pltff Flaherty has offered additional reasons for not setting a new schedule to include a) access to court files b) work commitments; and c) recent case filed before USDJ Platt. These explanations are further proof of Mr. Flaherty's intent to delay the court's decision on the merits of substantial motions fi in cases over 3½ years ago. I recommend that both cases, the gov't motions be granted for pltff Flaherty's failure to prosecute in go faith. Filed as document number 89 in related case number 88-CV-3275. cmc |

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| 994: | | |
| /5 | 148 | TRANSCRIPT of hearing before Judge Nickerson for date of 4/29/94 filed. Appearances by James Flaherty, pro se and AUSA William Young. ESR Operator Mark Gjelaj. (This entry also applies to related case number 88-CV-3275.) dmc |
| /23 | 149 | Memorandum & Order dtd. May 12, 1994 by Judge Nickerson ADOPTING the recommendation of Magistrate Caden which is, as to this action, DISMISSING all claims and on related case CV 88-3275, the Court dismisses defendants' counterclaims and third-party claims. c/m eod 5/23/94 wba |
| 5/26/ | 150 | JUDGMENT DTD. 5/24/94 THAT PLAINTIFF TAKE NOTHING OF THE DEFENDANTS AND, THAT ALL CLAIMS IN 88CV-1275 ARE DISMISSED. C/M EOD 5/26/94 VV |
| 5/24/ | 151 | Letter from Marianne B. Flaherty to Judge Nickerson dtd. 5/23/94 Writing in respond and in opposition to both Mr. Young's and Ms. Mill letters as per Magistrate Judge Caden's 4/13/94 recommendation. EOD 6/1/94 vv |
| 6/1 | 152 | MEMORANDUM AND ORDER dtd. 5/27/94 Marianne Flaherty is not a party in this case and lacks standing to request the relief she seeks. The motion is denied. EOD 6/1/94 vv |
| 6/1 | 152 | TRANSCRIPT dtd. 6/25/93, filed. EOD 6/1/94 vv |
| 6/1/94 | 153 | TRANSCRIPT dtd. 4/13/94, filed. EOD 6/1/94 vv |
| 6/1 | 154 | TRANSCRIPT dtd. 8/17/93, filed. EOD 6/1/94 vv |
| 5/27** | 155 | ORDER TO SHOW CAUSE filed by Marianne B. Flaherty unsigned. EOD 6/8/94 vv |
| 5/27** | 156 | AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE. EOD 6/8/94 vv |
| 5/27** | 157 | MEMORANDUM OF ALW IN SUPPORT OF ORDER TO SHOW CAUSE. EOD 6/8/94 vv |
| 5/27** | 158 | COMPLAINT filed. EOD 6/8/94 vv |
| 6/7 | 159 | Letter from Mr. Flaherty to Judge Nickerson dtd. 6/6/94 pursuant to Local Rule Eastern District Rule 3(j) enclosed please find my motion to re-argue your May 12, 1994 Order of dismissal. EOD 6/8/94 vv |
| */ | 160 | MOTION TO RE-ARGUE THE MEMORANDUM AND ORDER OF JUDGE NICKERSON DATED MAY 12, 1994. EOD 6/8/94 vv |
| /10 | 161 | Marianne & James Flaherty's Notice of Motion returnable 7/15/94 at 9:30AM for relief from Judge Nickerson's Judgment dated 5/26/94. (ent'd. 6/13/94). eg |

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CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF | DEFENDANT | DOCKET NO _____ | PAGE ___ OF ___ PAGES

| DATE | NR. | PROCEEDINGS |
|---|---|---|
| ~~6/17~~ 6/17 | 162 | By Nickerson-Memo and Order dtd 6/8/94 denying pltff's motion to reargue. ent 6/17 mg |
| 6/20 | 163 | Letter dated 6/7/94 from James E. Flaherty to Judge Nickerson regarding Mag Caden's 4/13/94 Recommendation granting government's pending motions. (see for details). (ent'd. 6/21/94). eg |
| 6/20 | 164 | Letter dated 6/13/94 from James E. Flaherty to Judge Nickerson regarding Mag Caden's 4/13/94 Recommendation granting government's pending motions. (see for details). (ent'd 6/21/94). eg |
| 6/20 | 165 | Response of James E. Flaherty in opposition to government's 5/5/94 letters from Nancy Miller, AUSA & William Young, AUSA, relevant to Mag Caden's 4/13/94 recommendation to Judge Nickerson recommending the granting of the government's dispositive motions & dismissal of Flaherty's motion for failure to prosecute. (ent'd. 6/21/94). eg |
| 7/22 | 166 | JOINT NOTICE OF APPEAL by Marianne and James Flaherty with 88CV3275 Fee paid $105.00. Receipt #4296. Notice of Appeal and certified cop of docket sheet sent appealing judgment dtd 5/24/94 and order dtd 5/12/94. Service made by clerk. (EOD 7/26/94) mm |
| 7/27 | 166A | NOTICE OF APPEAL by interested party Marianne B. Flaherty filed. Appeal from Memorandum and Order dtd 5/27/94. Fee paid. R#164288. Notice of Appeal and certified copy of docket sheet sent to USCA. Service made by clerk. (EOD 7/27/94) mm |
| 11/21/90** | 167 | LETTER dtd 11/27/90 from Pltff to AUSA Miller re: enlargement of time to complete 3(g) filing. (EOD 8/11/94) mm |
| 5/7/90** | 168 | SUPPLEMENTARY NOTICE OF MOTION for expansion of the administrative record. (EOD 8/11/94) mm |
| 5/17/94** | 169 | LETTER dtd 5/12/94 from Pltff to AUSA Miller re: response to Mag. Caden's recommendation dtd 4/13/94. (EOD 8/11/94) mm |
| 8/11 | 170 | LETTER dtd 5/3/94 from AUSA William Young to Judge Nickerson re: support of Mag. Caden's recommendation of 4/13/94.(EOD 8/11/84) mm |
| 8/11 | 171 | Copy of TRANSCRIPT of 4/29/94 with exhibits.(EOD 8/11/94) mm |
| 8/11 | 172 | MEMO OF LAW in opposition to Mag. Caden's Order dtd 4/13/94 recommending dismissal of Pltff's cause for failure to prosecute. (EOD 8/11/94) mm |
| 8/11 | 173 | LETTER dtd 4/13/94 from AUSA William Young to Judge Nickerson re: status of case. (EOD 8/11/94) mm |
| 8/9** | 174 | USCA SCHEDULING ORDER file. Record due 8/29/94. Appellant's brief due 9/30/94. Appellee's brief due 10/31/94. Argument to be held 11/21/94. (EOD 8/11/94) mm (USCA#94-6201) |

# APPENDIX O

## FINAL JUDGEMENT USDC, EDNY, CV-88-1275

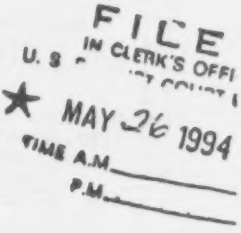
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
JAMES E. FLAHERTY,

Plaintiff,

-against-

JUDGMENT
88-CV-1275 (EHN)

NATIONAL MARINE FISHERIES SERVICE, FINANCIAL SERVICES DIVISION, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, UNITED STATES DEPARTMENT OF COMMERCE, C. WILLIAM VERITY, in his official capacity as Secretary of Commerce, WILLIAM EVANS, in his official capacity as Assistant Administrator for Fisheries, JAMES E. DOUGLAS, JR., in his official capacity as Acting Assistant Administrator for Fisheries, MICHAEL L. GRABLE, in his official capacity as Chief, Financial Services Division, National Marine Fisheries Service, and CHARLES L. COOPER, in his official capacity as Program Leader, National Marine Fisheries Service,




Defendants.
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A memorandum and order of Honorable Eugene H. Nickerson, United States District Judge, having been filed on May 23, 1994, dismissing all claims in 88-CV-1275, it is

ORDERED and ADJUDGED that plaintiff take nothing of the defendants; and, that all claims in 88-CV-1275 are dismissed.

Dated: Brooklyn, New York
May 24, 1994

Robert C. Heinemann
Clerk of Court